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No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Federal Energy Regulatory Commission (FERC) held a declaratory order proceeding called *Bountiful* to determine whether Section 7(a) of the Federal Power Act of 1920 grants a preference to states and municipalities over existing licensees in hydroelectric relicensing proceedings. Pacific Power & Light Co. (PP&L), the existing licensee of the Merwin project, was a party in *Bountiful* and urged no preference. Clark-Cowlitz Joint Operating Agency (CCJOA), a municipality under the Act and a competing applicant for the new Merwin license, was also a party and argued preference applied. FERC held Section 7(a) does grant a preference, the Eleventh Circuit affirmed and certiorari was denied. An Administrative Law Judge applied the preference in the *Merwin* project relicensing proceeding and awarded the new license to CCJOA. But FERC reversed the ALJ and itself, held there was no preference, and awarded the new license to PP&L. A D.C. Circuit panel reversed FERC's statutory construction and held that preclusion principles barred relitigation of the preference issue. A split en banc D.C. Circuit found preclusion principles irrelevant, affirmed FERC's statutory construction as reasonable, but remanded FERC's analysis of the economic impacts of a license transfer.

The questions presented are:

1. Is FERC's *Bountiful* holding on municipal preference res judicata in *Merwin* under this Court's decision in *United States v. Utah Constr. & Mining Co.*?
2. Does the preference established for a state or municipality by Section 7(a) of the Federal Power Act as enacted in 1920 apply in a relicensing proceeding against an existing licensee that is neither a state nor a municipality?
3. May FERC circumvent the statutory preference based on its own view of the economic effects of a license transfer?

LIST OF PARTIES

The parties to the proceedings before the D.C. Circuit Court of Appeals were the petitioner, Clark-Cowlitz Joint Operating Agency and the respondent, Federal Energy Regulatory Commission.

Intervenors below in support of petitioner were the American Public Power Association, the City of Bountiful, Utah, the City of Santa Clara, California, Northern California Power Agency, Sacramento Municipal Utility District, and the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California.

Intervenors below in support of FERC were the Pacific Power and Light Company, Edison Electric Institute, People of the State of California, *et al.*, Pacific Gas and Electric Company, Public Utility Commissioner of the State of Oregon, and the American Paper Institute, Inc.

Intervenors below on issues of mitigation measures for fish and wildlife were the Washington Department of Fisheries and the Washington Department of Game.

In addition, the United States, by the Department of Justice, filed an *amicus curiae* brief in support of FERC's petition for rehearing en banc and participated in the supplemental briefing requested by the en banc court.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, Clark-Cowlitz Joint Operating Agency (CCJOA) respectfully prays that a writ of certiorari issue to review the en banc opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on August 11, 1987 and further prays that the latter opinion and judgment be summarily reversed.

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the District of Columbia Circuit in *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n* ("Merwin") is reported at 826 F.2d 1074, and is reprinted in the separate Appendix accompanying this petition, at 1a-56a.

The panel opinion of the Court of Appeals for the District of Columbia Circuit in *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n* was reported at 775 F.2d 366, and is reprinted at 57a-92a.

The opinion of FERC in *Pacific Power and Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,052 (1983) (Opinion No. 191) is reprinted at 95a-198a, and *Pacific Power and Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,290 (1983) (Order Granting Interventions and Denying Rehearing) is reprinted at 93a-94a.

The Initial Decision of Administrative Law Judge Jon Lotis, *Pacific Power & Light Co.*, 23 F.E.R.C. (CCH) ¶ 63,037 (1983), is reprinted at 199a-309a.

The previous proceedings, called *Bountiful*, establishing that the municipal preference applies against an existing licensee, are: The Eleventh Circuit's decision in *Alabama Power Co. v. Fed. Energy Regulatory Comm'n*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983), reprinted at 310a-326a; *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337 (1980) (Opinion No. 88) reprinted at 329a-393a; and *City of Bountiful*, 12 F.E.R.C. (CCH) ¶ 61,179 (1980) (Opinion No. 88-A) (Order Granting Interventions and Denying Rehearing), reprinted at 327a-328a.

JURISDICTION

Pursuant to 16 U.S.C. 825l(b)(1986), the Clark-Cowlitz Joint Operating Agency (CCJOA) sought review in the District of Columbia Circuit of FERC's Opinion No. 191 issuing a new license to the Pacific Power & Light Company (PP&L) for the Merwin Project.

On October 22, 1985 a panel of the District of Columbia Circuit entered a judgment and opinion reversing FERC's Opinion No. 191 and remanded the case to the agency with instructions to reinstate the award of the license to CCJOA.

Rehearing en banc was sought by FERC and the existing licensee PP&L, and supported by the Department of Justice as *amicus curiae*. Rehearing en banc was granted, the panel opinion was vacated, and supplemental briefs were ordered submitted. On August 11, 1987 the en banc opinion was issued and judgment entered by the majority of a divided court affirming FERC's reversal of itself on the municipal preference issue, finding the Commission's actual analysis of the relative economic effects of a license transfer to be unreasoned and ordering a remand to FERC for further analysis of the economic impacts justifying its award of the license to PP&L.

The jurisdiction of this Court to review the en banc judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

Sections 7 and 15 of Part I of the Federal Power Act, respectively 16 U.S.C. § 800 (1982) and 16 U.S.C. § 808 (1982), as they existed prior to their amendment by the Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, §§ 2, 4, 100 Stat. 1243, 1245 (1986), are set forth in their entirety at 394a-397a.

STATEMENT OF THE CASE

This petition seeks review and summary reversal of a 4-3 decision of the District of Columbia Circuit en banc upholding the refusal of the Federal Energy Regulatory Commission (FERC) to honor its own declaratory order interpreting provisions of the Federal Power Act, in the first proceeding to apply that order. It is for this Court to determine whether FERC's attempt to "overrule" its declaratory order in a subsequent adjudication, involving the same parties and the same legal issue, does violence to the important principle of administrative *res judicata*,

and effectively nullifies the declaratory order provision of the Administrative Procedure Act.

The declaratory order in the FERC proceedings known as *Bountiful* established that the Federal Power Act granted a preference to states and municipalities against the existing licensee in hydroelectric project relicensing cases. The Clark-Cowlitz Joint Operating Agency, then a municipal applicant competing for the Merwin project license, and the existing licensee, Pacific Power and Light Co., participated fully in the generic *Bountiful* declaratory order proceedings with CCJOA urging that the Act granted the preference, and PP&L urging it did not. The split en banc decision, reversing a D.C. Circuit panel, sanctions FERC's overruling of *Bountiful* in the pending *Merwin* case, and permits FERC to issue a new license for the Merwin project to PP&L and to deny that license to CCJOA.

The importance of this case reaches far beyond that of a typical administrative licensing decision. It involves fundamental questions of administrative law, including the proper application of principles of preclusion, statutory construction, retroactivity and importantly, simple fairness. The en banc majority's decision affirming FERC's holding that principles of preclusion do not require it to follow its own 1980 ruling on preference in the Merwin Project adjudication will have far-reaching effects on reliance and expectations of finality for all who participate in administrative proceedings.

The central legal question in the *Bountiful* and *Merwin* proceedings was whether Section 7(a) of the Federal Power Act, prior to its 1986 amendment, provided a preference for states and municipalities in every relicensing competition, or whether, as PP&L unsuccessfully argued in *Bountiful*, the preference applies only when the existing

licensee is not among the competitors for the new license.¹ That question has consumed nearly a decade of litigation. A recapitulation of the major events follows:

The Merwin Hydroelectric Project. The Merwin hydroelectric project is located on the Lewis River between Clark and Cowlitz Counties in Washington (see Map, inside back cover). The Clark and Cowlitz County Public Utility Districts each own and operate electrical distribution systems coextensive with their respective county boundaries.

The Commission issued the original license for Merwin to the Inland Power and Light Company in 1929 for a period of 50 years. In 1941, the Commission approved a

¹ Section 7(a), prior to its amendment in 1986, expressed a preference in these terms:

In issuing licenses to new licensees under Section 15 [16 U.S.C. § 808] of this title the Commission shall give preference to applications therefore by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.

The dispute involves opposing interpretations on the scope of the municipal preference. FERC, in *Merwin*, has revived the statutory construction argument of opponents of municipal preference. The argument is that because the provisions of Section 15, cross-referenced by Section 7, address issuance of licenses to both "original" and "new" licensees, the municipal preference of Section 7(a) must therefore be considered limited to competitions between new applicants and does not apply when the "original" licensee is among the competitors. However, proponents of municipal preference argue that Section 7(a) sets standards for the Commission's decisionmaking process—its process of determining whether to issue a license to a "new" licensee—and every competitive proceeding will include a potential "new" licensee.

The legislative history of the Federal Water Power Act of 1920 is concisely set forth in the briefs of CCJOA and the City of Bountiful, Utah previously supplied to the Court in Nos. 82-1312, 82-1345, and 82-1346, *Utah Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 463 U.S. 1230 (1983).

transfer of the license from Inland to PP&L.² See *Pacific Power & Light Co.*, 2 F.P.C. 508 (1941), and *Inland Power & Light Co.*, 1 F.P.C. 380 (1937).

In 1976, PP&L applied for a new license for the Merwin project. That same year, the two public utility districts formed the Clark-Cowlitz Joint Operating Agency to seek the new license for Merwin. CCJOA filed its application in 1977. The Commission consolidated the competing applications for further proceedings ["the *Merwin* proceeding"].

Bountiful. In September 1978, in response to petitions by the City of Bountiful, Utah and other municipal applicants seeking declaratory orders to resolve with finality the issue of municipal preference on relicensing of hydroelectric projects, the Commission publicly noticed the initiation of a declaratory order proceeding ["the *Bountiful* proceeding"]. FERC's notice invited full public participation, and virtually the entire public and private utility industry responded. The Commission set a briefing schedule for "resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case." *City of Bountiful*, Docket No. EL78-43 (May 3, 1979) (unpublished) (Order Granting Interventions and Setting Briefing Schedule), J.A. at 1-4.*

The Commission granted intervention to both CCJOA and PP&L and made it clear that the applicability *vel non* of municipal preference with respect to the *Merwin* proceeding was to be decided in *Bountiful*: "In addition—assuming for the sake of argument that we decide that Section 7(a) applies in relicensing cases—CCJOA and PP&L may litigate in the relicensing proceeding on the Merwin

² Thus PP&L is not an "original" licensee under Section 15. The majority en banc opinion nevertheless erroneously refers to PP&L as an *original* (emphasis the court's) licensee in finding FERC's new reading of the FPA reasonable. 28a.

*J.A. citations refer to the Joint Appendix filed in the D.C. Circuit.

Project, the separate specific question of whether CCJOA is entitled to such a preference," i.e., whether its plans were, or within a reasonable time could be made, equally well adapted. J.A. at 2.

After extensive briefing and an extraordinary full day of oral argument, the Commission issued its unanimous *Bountiful* opinion in June 1980. It declared the municipal preference applicable against the original licensee on relicensing, noting that such application would be a "tie breaker" following a Commission finding that the competing plans were "equally well adapted." 386a. The Commission said its role was *only* to determine "whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920." 339a. The Commission left for resolution in the site-specific relicensing hearings to follow, a determination of the particular "public interest" factors which could be considered in selecting a new licensee. 389a-393a. The Commission further ordered that the processing of the pending competing applications "go forward in the light of this declaratory order." 393a.

In September 1981, the Commission set the competing Merwin applications for hearing, explaining that resolution of the case need not await judicial review of *Bountiful* because the purpose of the *Merwin* hearing was limited to a determination of whether CCJOA's plans were "equally well adapted" in the public interest to those of PP&L and that "[t]he outcome of the appeal of [*Bountiful*] will have a bearing in the instant proceeding only if the Commission finds, at the conclusion of the hearing, that the competing applications are equally well adapted." J.A. at 289-290.

The Eleventh Circuit Affirms Bountiful. Meanwhile, many private utilities, including PP&L, had appealed *Bountiful*. Those appeals were consolidated in the Eleventh Circuit. CCJOA had intervened in support of the Commission. In its brief, the Commission unequivocally defended its

interpretation of the municipal preference question, J.A. at 60, and informed the court that immediate resolution of the question was important:

There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change depending on the factual setting. [Citation omitted]. Moreover, the immediate resolution of this issue will have a practical impact upon a number of licensing cases. Potential applicants (particularly municipalities with limited resources) need to know whether or not they will get the benefits of the statutory preference when they compete against the incumbent.

J.A. at 56 n.4.

The Eleventh Circuit found FERC's opinion "will have a direct and immediate impact upon the petitioners, the states and potential applicants, as well as the workload of the Commission," 320a, and affirmed the Commission on all counts. *Alabama Power Co. v. Fed. Energy Regulatory Comm'n*, 685 F.2d 1311, 1315 (11th Cir. 1982), 314a. The court held that the preference applies "in all competitive relicensing cases, not just those where the original licensee is not an applicant." 326a. In response to the private utilities' contrary interpretation that the "plain language" of the statute supported the view that original licensees were not subject to the municipal preference, the court stated "we easily overcome the plain meaning hurdle," 322a, finding that "the adoption of a 'limited preference' advantages incumbent licensees and thus leads to an absurd result." *Id.* Finding that "the Commission properly relied heavily upon legislative history," *Id.* at 323a, the court concluded that the Commission's construction of the statute was "consistent with the statute's language, structure, scheme, and available legislative history." 325a.

The Merwin Evidentiary Hearing. Three days after the Eleventh Circuit's decision, the *Merwin* hearing began. The applicability of the municipal preference was not disputed. Indeed, PP&L's post-hearing briefs conceded that *Bountiful* was binding on the *Merwin* case. Initial Brief of Pacific Power & Light Co. at 2, J.A. at 513-14.

PP&L argued at hearing that its costs for power alternative to the *Merwin* resource exceeded CCJOA's costs of alternative power, and thus, PP&L should receive the license "in the public interest." CCJOA disputed PP&L's alternative cost analysis, but more importantly, challenged the relevance of economic evidence to the licensing determination. CCJOA maintained that the relative economic impacts of a relicensing decision were not within the scope of the Commission's authority under Section 7(a) to assess the technical merits of the applicant's "plans" for utilization of the water resource. The case was submitted to the administrative law judge in February 1983.

The Commission's Secret Decision on Alternatives to Reverse Bountiful. While the *Merwin* proceeding was still pending before the ALJ, the private utilities filed petitions for a writ of certiorari to the Eleventh Circuit in *Bountiful*. On April 25, 1983, the Commission, which by then included several new Commissioners who had not participated in deciding *Bountiful*, held a closed meeting to discuss those petitions. As the Commission later revealed, a majority of the Commissioners at the meeting expressed their disagreement with *Bountiful* and voted to request the Solicitor General to recommend that the Supreme Court grant the petitions for certiorari, vacate the judgment of the Eleventh Circuit, and remand *Bountiful* to the Commission for reconsideration. J.A. at 108.³

³ The Commission later revealed that it also discussed *Merwin* as an "alternative forum [] for confronting the municipal preference in case it was not resolved in *Bountiful*." FERC's Opposition to CCJOA's Cross Motion at 7, dated September 6, 1983, see *CCJOA v. FERC*, D.C. Cir. No. 83-2111, Joint Appendix at 169.

The ALJ's Decision to License CCJOA. Three days after the Commission's closed session and secret decision to reverse *Bountiful*, the *Merwin* ALJ issued his decision. Based on the evidence offered on the competing applicants' plans for electric generation, hydraulic coordination, flood control, recreation, and fish and wildlife concerns, the ALJ concluded that the plans of the two applicants were equally well adapted, that preference should therefore be given pursuant to Section 7(a) of the Act to the application of CCJOA, that a license should issue to CCJOA. The ALJ also set the formula for calculation of the net investment payable to PP&L upon a license transfer pursuant to Section 14 of the Act, 16 U.S.C. 807. 283a.

The ALJ also found that the relative economic benefits of *Merwin* to the competing applicants were beyond the scope of matters entrusted by Congress to the Commission's purview under Section 7(a), but in any event, a license transfer would not change the total requirements for or supplies of power in the Pacific Northwest and the ultimate effect on costs and benefits in the region would be an "economic wash." 252a.

Bountiful Becomes Final. The Solicitor General, on behalf of the Commission, filed with this Court a brief in support of the private utilities' request for certiorari in *Bountiful*. Importantly, as to the binding nature of *Bountiful* the Solicitor General stated: "Under traditional res judicata principles, if this Court denies certiorari and the Court of Appeals judgment affirming the Commission's declaratory order becomes final, these entities may be bound by the Commission's order in any future relicensing proceeding." J.A. at 107. The brief recommended remand, not to the Commission, but to the Eleventh Circuit for such reconsideration as deemed appropriate in view of the "intervening circumstance" that four new Commissioners appeared ready to overrule *Bountiful*. It was not represented that *Bountiful* had been wrongly decided.

In July 1983, this Court denied certiorari, terminating the *Bountiful* litigation. *Utah Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 463 U.S. 1230 (1983). The issue of the applicability of the municipal preference on relicensing appeared finally settled.

The Commission's Merwin Decision. Despite the apparent finality of *Bountiful*, the Commission destroyed the result in reviewing the ALJ's decision in *Merwin*, in Opinion No. 191. 95a-198a.

Without any published notice to CCJOA or anyone else that the apparently settled *Bountiful* case would be reconsidered in *Merwin*, without any public input, and without any request from the parties in *Merwin*, a majority of the new Commissioners *sua sponte* "overruled" *Bountiful* and held that states and municipalities do not have a preference in any relicensing case involving the "original licensee." 99a. In contrast to its representations to the Eleventh Circuit, FERC concluded that the statutory preference was limited, applying "against all adversary non-preference applicants *other than* 'original licensees' in possession of project works," (emphasis added), and, reversing the ALJ, issued the new license to PP&L. *Id.*

In justifying their changed view, the new Commissioners adopted all of the legal arguments that had been rejected unanimously by their predecessors and the Eleventh Circuit. The Commission made clear that the real concern was that it disagreed with the policy established by Congress in the Federal Power Act. The new Commission majority disparaged the public preference embodied in the 1920 Act as "a conception of that era," 141a, whose relationship to the public interest is "considerably weaker today than in 1920." 148a. The Commission found CCJOA's plans equal to PP&L's with respect to power production, flood control, fish and wildlife and recreational facilities, but nevertheless concluded that broad economic considerations were within the Commission's scope of review and

that these "weigh in favor of allowing the power benefits of the Lewis River at Merwin to remain with the segments of the public served by PP&L." 150a.

Two Commissioners dissented from the overruling of *Bountiful*. Commissioner Hughes urged that "the time for finality has arrived" as to the relicensing preference issue. 198a. Commissioner Sheldon's separate opinion questioned how the agency could maintain its image and credibility "as a tribunal" and "[h]ow can such a body ask the appellate courts to defer to its 'expertise?'" J.A. at 697-698.

CCJOA requested rehearing of Opinion 191, J.A. at 707-769. The Commission denied rehearing in a two-page *pro forma* order. 93a-94a.

The D.C. Circuit Panel's Reversal of FERC. CCJOA sought review in the District of Columbia Circuit of FERC's Opinion No. 191 pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825(b)(1982). In its October 22, 1985 opinion, the D.C. Circuit reversed FERC's Opinion No. 191 and remanded with directions to reinstate the ALJ's decision awarding the license to CCJOA. 57a.

On the preclusion issue the court held that the "[preference] issue which the Commission seeks to relitigate is one which is and ought to be closed." 73a. The panel said that the facts with respect to the preference were identical, that all of the *Merwin* parties had been parties in *Bountiful*, and that it was "amply evident . . . as to parties to *Bountiful*, FERC was not entitled to relitigate the municipal preference question." 76a.

As to the statutory construction issue, the court held:

In short, the statute on its face may be somewhat unclear; but the legislative history removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent licensee.

84a.

The court also agreed with CCJOA that the Commission did not have statutory authority to use economic impacts to second-guess Congressional intent, which would "render the statutorily-mandated municipal preference a nullity." 85a; and that even if FERC could use economic impact as a decisional criterion, its application of economic impact analysis to the present case would have to be reversed as arbitrary and capricious. 88a.

FERC and PP&L sought rehearing en banc of the panel opinion. The Department of Justice supported FERC's petition. Rehearing en banc was granted, and the panel opinion vacated. Supplemental briefing was ordered to answer questions specified by the court.

Electric Consumers Protection Act. While rehearing en banc was pending, Congress amended Section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensings but specifically provided that the *Merwin* proceedings continue to be governed by the existing statute. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 2, 11, 100 Stat. 1243, 1245 (1986). The legislative history explained the *Merwin* exemption:

The issues before the court in the *Merwin* case are not intended to be resolved or affected by this bill. We do not interpret the law as it exists today, nor do we urge the court to decide for or against the existence of preference. The courts must resolve the matter without regard to H.R. 44.

... In view of the advanced state of the *Merwin* proceeding and in fairness to the legitimate expectations of the competing applicants, all proceedings related to this case should continue to

be governed by the provisions of current law as interpreted in judicial decisions.

H.R. Rep. No. 99-507, 99th Cong. 2d Sess. 16-17, 48 (1986).⁴

D.C. Circuit En Banc Opinion. The 4-3 opinion of the D.C. Circuit en banc was issued and judgment entered on August 11, 1987. The majority held that preclusion principles do not require that PP&L be bound in *Merwin* by the Commission's decision in *Bountiful*. 9a-14a.

The majority upheld FERC's new statutory interpretation, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It held that FERC's construction was a reasonable one and that the statute allowed FERC to take into account the economic consequences of its award of a new license. However, it found that FERC's actual economic analysis "falls short of the standards of reasoned decision making and thus requires a remand of the case to the agency." 5a.

Three judges dissented, stating: "The court today manages in one opinion to do violence to principles of preclusion, retroactivity and statutory interpretation." 39a. The dissent found FERC precluded from reversing its holding in *Bountiful* as to CCJOA and PP&L, and FERC's reinterpretation on municipal preference "untenable" and one which "leaves the statute meaningless." 54a, 55a.

CCJOA requested, pending certiorari, a stay of the Circuit's remand. The Court en banc denied the petition for stay.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to reverse the failure below to recognize the applicability of *res judicata* to an

⁴ See also S. Rep. No. 99-161, 99th Cong., 1st Sess. 10-11 (1985).

administrative agency, contrary to holdings of this Court; to resolve the conflicting and anomalous results from two circuits on a strict question of law arising out of applying substantially the same principles of judicial review of agency action; and to reverse action allowing the agency to subvert the municipal preference by an economic impact analysis.

I. The Majority En Banc has Violated the Law Declared in *United States v. Utah Construction and Mining Co.*, That Res Judicata Applies to Administrative Adjudication

This Court has made it clear that a final adjudicative determination by an administrative tribunal has the same res judicata effect on the litigating parties as a judgment of a court:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

United States v. Utah Constr. and Mining Co., 384 U.S. 394, 422 (1966).⁵

⁵ The *Utah* holding was cited in *Hayfield Northern R.R. Co. v. Chicago and North Western Transp. Co.*, 467 U.S. 622, 636, n.15 (1984), as authority for the proposition that an I.C.C. ruling "may well have preclusive effect in state condemnation proceeding." See also *Pacific Tel. & Tel. v. Public Utilities Comm'n*, 443 U.S. 1301, 1304 (1979) and *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 485 n.26 (1982). See also dissenting opinion to the denial of certiorari in *McCarren v. Town of Springfield*, 464 U.S. 942, 944-945 (1983), in which then-Justice Rehnquist cited *Utah* as a reason for granting certiorari to review the refusal of a federal district court to accord any res judicata effect to a determination of the Vermont Public Service Board.

The fundamental importance of the preclusion principles involved

Utah Construction clearly requires that FERC's declaratory order in *Bountiful* be given res judicata effect in *Merwin*.

The majority opinion of the divided Circuit en banc misconstrued the nature of res judicata and made its primary focus the preclusive effect on FERC of the Eleventh Circuit's opinion. As noted by the dissent, the "more important" issue is the preclusive effect of FERC's *Bountiful* decision on PP&L in the *Merwin* litigation. 51a-52a. PP&L litigated and lost the municipal preference issue in *Bountiful*. The question before the en banc court was therefore not, "an agency's ability to change its mind about the law and to act upon its new interpretation," (9a), as the majority stated, but rather an agency's ability to reverse itself on the same legal issue *between the same parties*.

The majority dismissed this application of preclusion by footnote, stating, that since the decisionmaker, FERC, and not PP&L, changed its mind on municipal preference, preclusion was "irrelevant." 13a n.5. With deference, this rather naive argument simply decimates res judicata. There is no real difference between a party asking a tribunal to ignore matters litigated and lost and the tribunal itself doing so *sua sponte*. The end result is the same. The goals of preclusion—to protect against repetitious litigation, to promote confidence in decisions, and to secure repose—are equally frustrated.

here has been recognized by this Court:

[T]his court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.

Kremer v. Chemical Constr. Co., 456 U.S. at 466-467 n.6 (1982).

The majority's footnote also contends that even if preclusion of PP&L was to be considered, the doctrine should not be applied if it would result in "inequitable administration of the law." *Id.* That would be the result here, the majority says, because it would accord CCJOA a benefit denied by Congress in the passage of ECPA to others similarly situated, while burdening PP&L in a way the numerous other private utilities in *Bountiful* would not be burdened. *Id.*

Again, with all due respect, this view totally disregards the action taken by Congress when it expressly *excepted Merwin* from ECPA. As the legislative history of ECPA makes clear, "[t]he issues before the court in the *Merwin* case are not intended to be resolved or affected by this bill. . . . The courts must resolve the matter without regard to [ECPA]"; and "[i]n view of the advanced state of the *Merwin* proceeding and in fairness to the legitimate expectations of the competing applicants, all proceedings related to [*Merwin*] should continue to be governed by the provisions of current law as interpreted in judicial decisions."⁶ Despite these Congressional directives, the en banc majority nevertheless has used ECPA to rationalize its failure to enforce *res judicata*, arriving at an unfair result.

The majority's mistaken view of what is equitable must in any event yield to *res judicata*. As this Court stated in *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981); "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the statutory principles of *res judicata*.'"⁷

⁶ *Supra* at 13. Furthermore, if the majority's view goes uncorrected, CCJOA will be left empty-handed and minus the substantial monies it has expended in its long effort to vindicate the statutory preference while other municipal competitors will be able under ECPA to collect, at a minimum, their pre-ECPA expenses of pursuing their competing applications. ECPA, § 10.

⁷ *Moitie's* holding that there is no rule of law permitting a tribunal

The majority's rationale that "as a general matter preclusion principles are to be applied more flexibly to administrative adjudication than to judicial proceedings," 13a n.5 ignores the very purpose of the *Bountiful* declaratory order proceeding: to resolve with finality the municipal preference question.⁸

to reverse the effect of a final prior judicial decision on parties to them, even if it believes the decision incorrect, 452 U.S. at 399, has been undercut by the en banc majority's views on the lack of effect here of the Eleventh Circuit's opinion affirming *Bountiful*. That view appears to ignore the D.C. Circuit's own teachings in *City of Cleveland v. Fed. Power Comm'n*, 561 F.2d 344 (D.C. Cir. 1977) concerning the inviolability of the mandate of an appellate court by an inferior court or administrative agency. Whether considered as the "mandate rule," or "law of the case", the principles involved "... indulge no exception for reviews of administrative agencies" 561 F.2d at 346. Further, the Commission's action in *Merwin* gives absolutely no effect to the Eleventh Circuit's mandate and would, if sustained, necessarily make that court's ruling a meaningless and unconstitutional effort with no effect on any cases or controversies. See *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947); L. Tribe, *American Constitutional Law* 56-58 (1978).

Similarly, but somewhat further afield from the real issue here, the en banc's massive struggle with retroactive application of agency action, on which a positive finding apparently had to be made in order to support FERC's flip-flop, shows deep division on the proper application of that Circuit's own rules in *Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). The principle concerns of retroactivity doctrine, "lack of notice and degree of reliance on former standards," *Id.* at 390 n.22, so important to the vast company affected by agency action, were both poorly served here, as the dissent's dissection of retroactivity illustrates. 39a-54a. As we have noted, the majority's view (expressed also as part of its retroactivity exercise) that CCJOA would get an unwarranted benefit if retroactivity were withheld is not borne out by the law or the facts.

* Restatement (Second) of Judgments § 33 (1982) describes the effect of declaratory orders:

A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and in accordance

As the dissent below observed: "The guiding principle for application of preclusion doctrine to agency adjudication is that 'res judicata applies where what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact.'" 52a, citing K. Davis, 4 *Administrative Law Treatise*, 52 (2d. ed. 1983).⁹ All the elements for application of res judicata were present in *Merwin* which was an adjudication concerning the same issue, and the same parties.

with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

FERC declaratory order proceedings, based on 5 U.S.C. 554(e), are clearly adjudications, entitled to full preclusive effect. The legislative history of 5 U.S.C. 554(e) notes: "The administrative issuance of declaratory orders would be governed by the same principles that govern declaratory judgments in the courts. Such orders, if issued, would not bind those not parties to them, or determine subject matter not presented." H.R. Rep. No. 1980, 79th Cong. 2d Sess. 31 (1946).

The Commission's reversal of *Bountiful* violates the rule that declaratory actions must settle "an autonomous and independent dispute, involving issues of vital importance to the parties involved." 6A J. Moore, *Moore's Federal Practice* ¶ 57.08[4] at 48 (2d ed. 1983). If the *Merwin* decision stands, the declaratory proceeding in *Bountiful* will not have settled anything, even as between CCJOA & PP&L.

The en banc court called for supplemental briefs on several specific questions about agency declaratory proceedings, whether they might be viewed as rulemakings and whether they had the same preclusive effect. The responses generally indicated that while agency usage varied and was not as frequent as it might be, declaratory proceedings at FERC and its predecessor, FPC, were not at all unusual, were fully provided for in FERC's rules, were considered binding, and had been of long-standing. See Comment, *Declaratory Orders, Uncertain Tools to Remove Uncertainty?* 21 Ad. L. Rev. 257 (1969).

⁹ Similarly, the Restatement (Second) of Judgments § 83 (1982) provides in relevant part that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions, as a judgment of a court."

The majority's examination of the preclusion issue in terms of preclusion of FERC by the Eleventh Circuit is also flawed. The court refuses to preclude FERC, because it views the issue of whether a municipal preference applies in all relicensings as a different issue than whether a municipal preference does *not* apply to relicensings to which the incumbent licensee is a party. 11a. As a matter of logic, this argument is absurd. For *res judicata* purposes, the dissent correctly recognized the positive of an issue is the same as the negative of an issue. 43a. As a matter of law, the argument is also absurd: either the statute grants a meaningful municipal preference (a preference which applies against an existing licensee) or it does not. This question of law was decided affirmatively in *Bountiful*, by both FERC and the Eleventh Circuit, and FERC is bound by this with respect to PP&L and CCJOA.

Finally, the en banc result seriously undercuts the utility of administrative declaratory proceedings. This "valuable tool", 54a, established by Congress in Section 554(e) of the Administrative Procedure Act and to be given the same effect as governs declaratory judgments in the courts, cannot, in the face of this opinion, be utilized with any real confidence. This result is particularly disturbing coming as it does from the D.C. Circuit which, at the seat of government, deals with far more administrative agency actions than any other. As the dissent concluded (*Id.*) "the court's result thus works a substantial disservice to both preclusion doctrine and administrative law." 54a.

This erroneous and unfortunate result should be corrected by summary reversal.

II. Reversal is Required to Correct the En Banc Majority's Erroneous Statutory Interpretation On the Municipal Preference Question

This Court should correct (and can, by enforcing *res judicata*) the anomaly arising out of the Eleventh Circuit's upholding preference in *Bountiful* and the D.C. Circuit's

upholding no preference in *Merwin*. This Court is the last word on what Congress intended by the municipal preference declared in the Act.

FERC's decision in *Bountiful*, the Eleventh Circuit's decision in *Alabama Power*, the D.C. Circuit panel's decision in *Merwin* and the en banc dissent, were all consistent and correct in holding that the Act grants a preference to municipalities over all other applicants, including the original or prior licensee. Even the majority below found the CCJOA view "not without force" and conceded that FERC's new look was "not entirely free from doubt." 30a-31a. Yet the majority said it was "duty bound" under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to uphold FERC since it was "beyond cavil" that Section 7(a) was reasonably susceptible to FERC's new interpretation. 31a (see other *Chevron* references at 4a, 12a, 23a, 26a, 30a and 33a). The result is the diametric opposite of the reading of the Act upheld in *Bountiful*.

While this unfortunate spectacle is not considered as such in the opinion below, See 11a-12a, the fact is that the Eleventh Circuit pre-*Chevron*, but in effect applying *Chevron* principles, found it could "easily overcome" the private utilities' "plain meaning" reading of Section 7(a) (the same view FERC adopts now as its reinterpretation), found that view led to "absurd results", and had no support in the legislative history. 322a-323a. The Eleventh Circuit further found the prior Commission's interpretation "consistent with the statute's language, structure, scheme and available legislative history." 325a. These conclusions contrast sharply with the holdings below that FERC's reinterpretation "is reasonable and consistent with Congressional intent," 5a, see also 26a, 28a and 38a, and that "[n]othing in the legislative history warrants upsetting this construction of the statute," 31a.

Such disparate and incompatible results, through application of this Court's holdings on the scope of judicial review of agency determinations to justify them, warrant correction by this Court. Putting to one side how the question reached the two Circuits, the question throughout has remained the identical *legal* question that the Commission framed in *Bountiful* for decision.

Chevron emphasizes the necessity of finding Congressional intent as the first factor to consider on judicial review. 467 U.S. at 842. The Court in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1220, 1221 (1987), recently reiterated that principle, along with *Chevron's* teaching that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent" 467 U.S. at 843 n.9.

There is ample legislative history showing that "clear congressional intent" requires rejection of FERC's reverse interpretation. As just one example, Congressman Lee, a manager of the Conference Committee on the bill which became the Act, told the House:

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.

83a.

Pointing to similar support in the legislative history the D.C. Circuit panel concluded that while the statute on its face might be somewhat unclear:

... the legislative history removes any shadow of doubt of what Congress wanted to happen when relicensing time arrived. The municipal

preference applies to all relicensing including those involving an incumbent licensee.

84a. The legislative history as summarized in that opinion, 78a-84a, is compelling and dispositive of the en banc majority view that "*nothing*" in that history warrants upsetting FERC's construction of the statute in *Merwin*.

The judgment below should be reversed to make clear that courts must resolve questions of statutory construction by correcting agency deviations from express congressional intent.

III. The Court Should Not Allow the Commission to Use an Economic Impact Analysis to Circumvent Application of the Municipal Preference

The Commission in *Bountiful* determined that the municipal preference of Section 7(a) does apply against the existing licensee as a "tie breaker" in the event a municipal applicant's plans are found "equally well adapted, to conserve and utilize in the public interest the water resources of the region." 389a. *Bountiful* provided that whether there is a tie or not "will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest. *Id.* While FERC expressed "some generalizations" about the public interest determination, it indicated it would be "premature to address the applicability; relevancy and materiality of particular areas of consideration," which would "vary from case to case," and therefore "left it to the Commission to determine the 'public interest' in the light of the facts and contentions in each particular application." 389a-393a.

The ALJ found the relative economic effects of issuing a new license to be outside the Commission's purview when applying the municipal preference under Section 7(a). 252a. FERC, in Opinion No. 191, overruled its own earlier hold-

ing on municipal preference in *Bountiful* as well as the ALJ's determination that economic impacts cannot be used to overrule the mandatory municipal preference, and then awarded the license to PP&L on the sole basis that the economic effects of a license transfer in its view justified giving PP&L another long-term license. 149a-150a.

The D.C. Circuit panel reversed FERC, agreeing with the ALJ that such economic impacts were not encompassed within FERC's authority to assess an applicant's technical, water-power related "plans," under Section 7(a), and also found FERC's actual economic impact analysis arbitrary and capricious. 88a.

The D.C. Circuit en banc held that, because the *Merwin* relicensing competition does not involve the municipal preference of Section 7(a) and instead is a proceeding "arising under the latter half of Section 7(a), . . . FERC may include in its deliberations consideration of the economic consequences of the grant of a license." 33a. However, even the en banc majority found that FERC's actual economic analysis employed in *Merwin* to deny CCJOA the license was unreasoned and ordered a remand for further "elucidation." 38a.

This Court's reversal of the en banc majority on res judicata grounds and consequent application of municipal preference to the *Merwin* proceeding will bar FERC upon any remand from utilizing the relative economic consequences of a license transfer to circumvent the municipal preference and to deny CCJOA the license. As the D.C. Circuit panel held, if FERC could issue a new license on its own view of the economic consequences, it "would render the statutorily-mandated [m]unicipal preference a nullity." 85a. In view of the long and tortuous path CCJOA has been forced to travel, CCJOA asks confirmation of that conclusion as to economic consequences so there can be no question that CCJOA will be shielded from a further round of FERC machinations and appeals on this subject.

CONCLUSION

For the foregoing reasons, the writ should be granted, the en banc decision of the D.C. Circuit summarily reversed, and the case remanded with directions to reinstate the award of the license to CCJOA.

Respectfully submitted,

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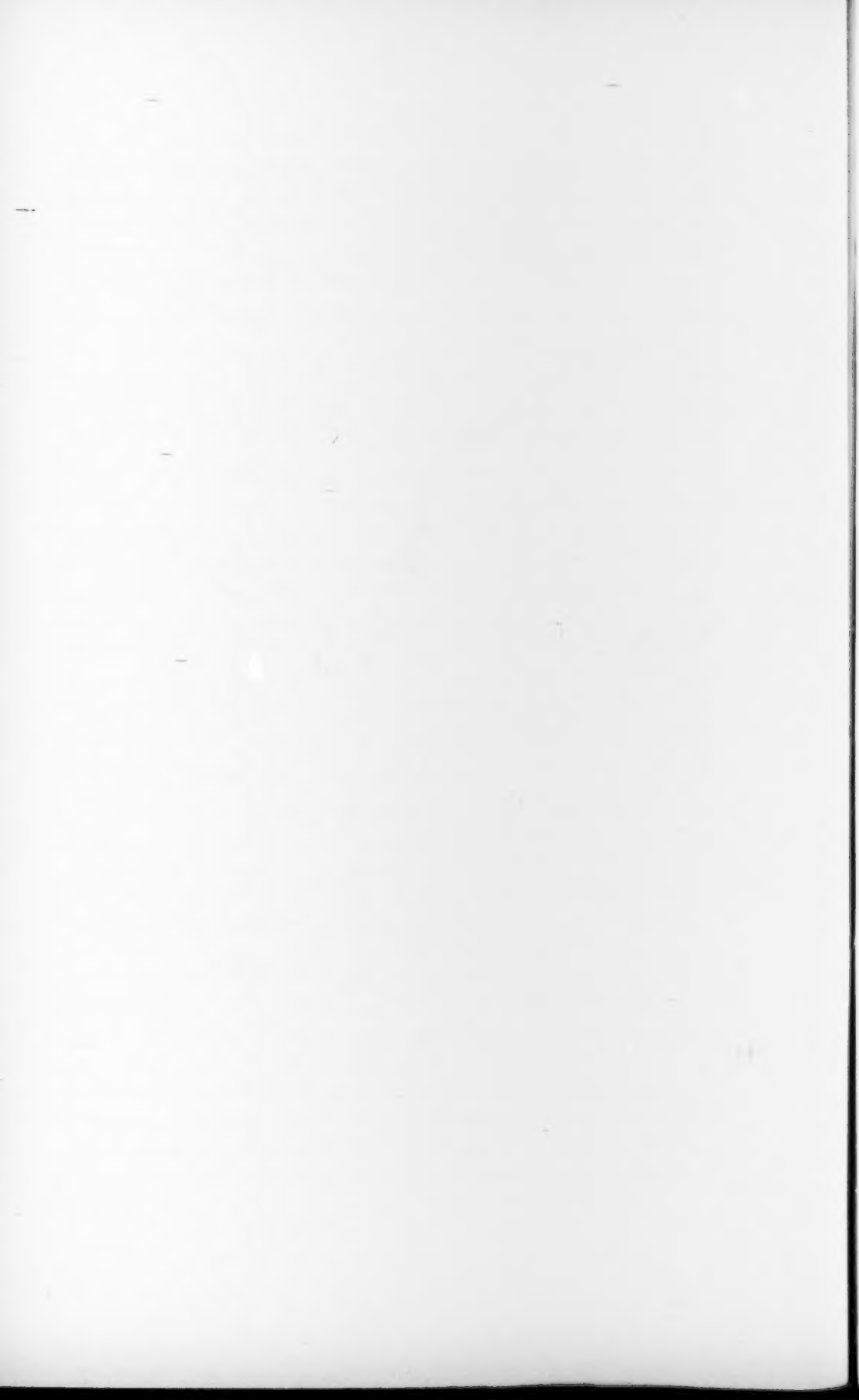
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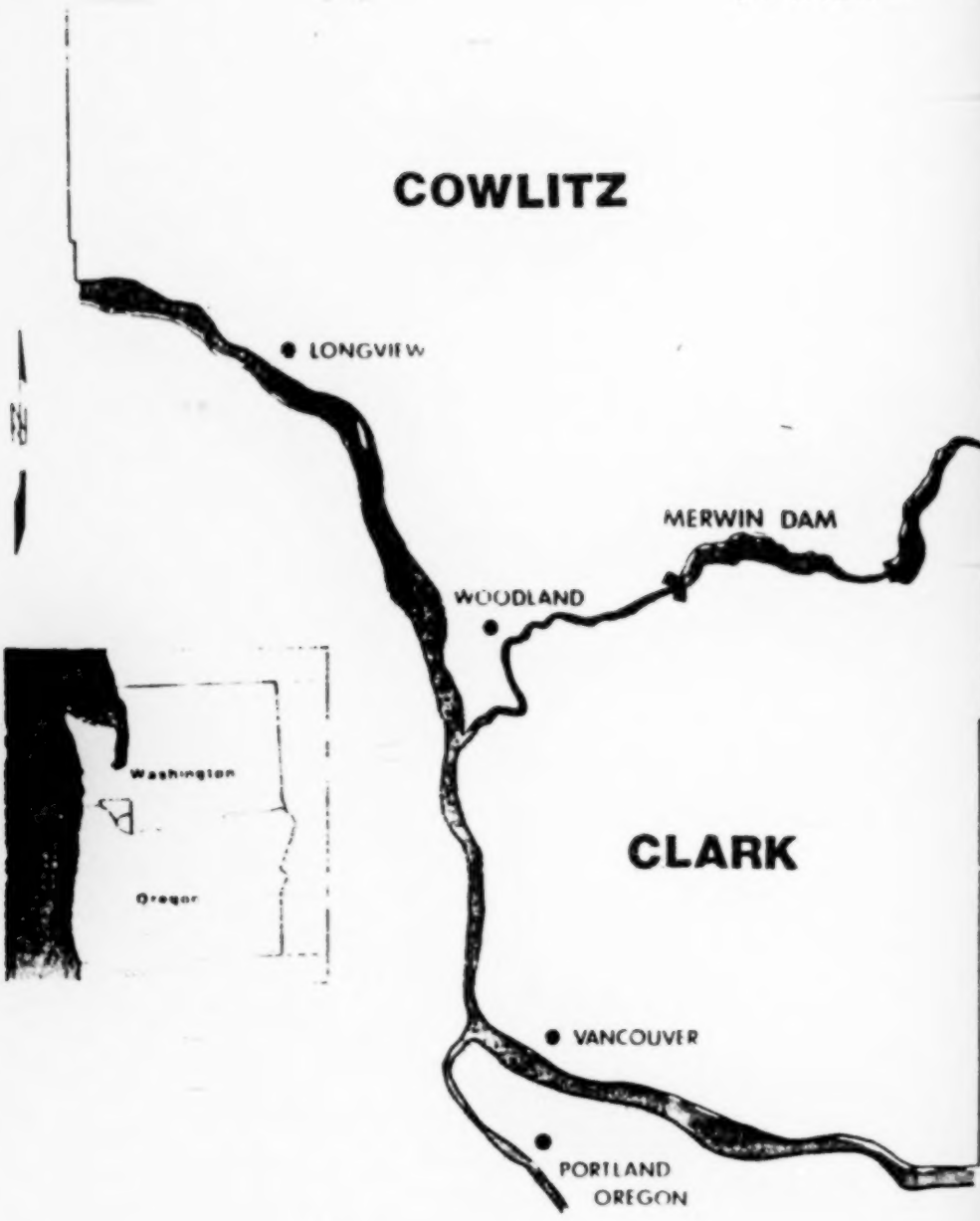
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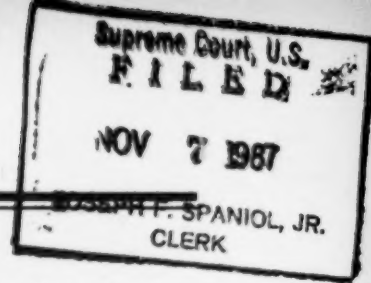




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87-771

No. _____



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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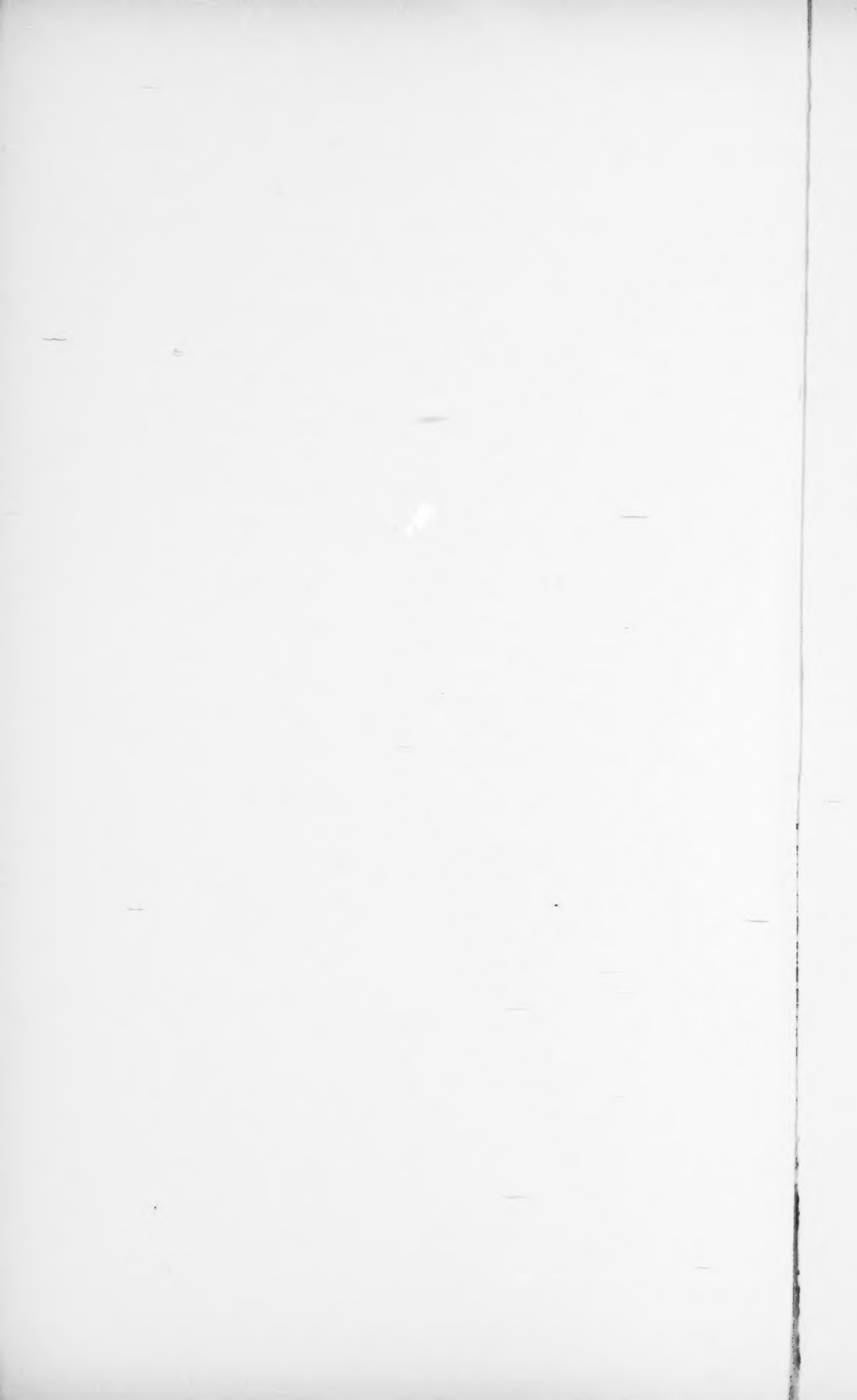
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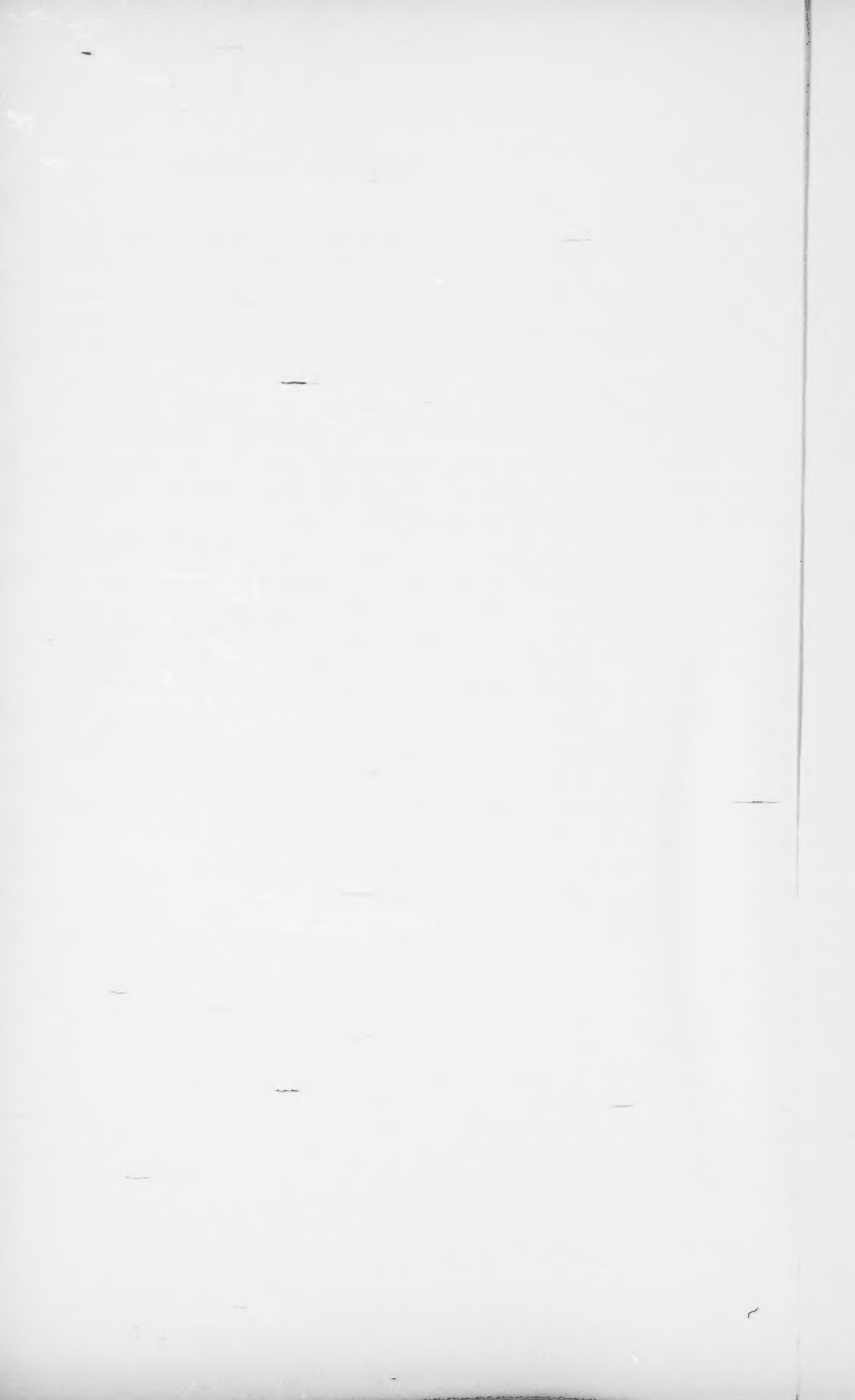
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APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2231

CLARK-COWLITZ JOINT OPERATING AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PEOPLE OF THE STATE OF CALIFORNIA, et al.,
PACIFIC POWER & LIGHT COMPANY,
EDISON ELECTRIC INSTITUTE,
SACRAMENTO MUNICIPAL UTILITY DISTRICT, et al.,
PACIFIC GAS & ELECTRIC COMPANY,
PUBLIC UTILITY COMMISSIONER OF THE STATE OF OREGON,
WASHINGTON STATE DEPARTMENT OF FISHERIES, et al.,
AMERICAN PAPER INSTITUTE, INC.,
CITY OF SANTA CLARA, CALIFORNIA, et al.,
AMERICAN PUBLIC POWER ASSOCIATION, INTERVENORS

Petition for Review of an Order of the
Federal Energy Regulatory Commission

Argued *En Banc* March 31, 1986

Decided August 11, 1987

Christopher D. Williams, with whom *Robert L. McCarty* and *George H. Williams, Jr.* were on the brief for petitioner.

Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission, with whom *William H. Satterfield*, General Counsel, *Joseph S. Davies* and *John N. Estes, III*, Attorneys, Federal Energy Regulatory Commission were on the brief for respondent. *Arlene P. Groner*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Thomas H. Nelson for intervenor, Pacific Power & Light Company. *Hugh Smith* also entered an appearance for intervenor.

Janice E. Kerr, *J. Calvin Simpson* and *Peter G. Fairchild* were on the brief for intervenors, People of the State of California, et al.

James B. Liberman, *Ira H. Jolles* and *Peter B. Kelsey* were on the brief for intervenor, Edison Electric Institute.

Robert C. McDiarmid, *Daniel I. Davidson*, *Frances E. Francis*, *Ben Finkelstein*, *G. Philip Nowak* and *Charles H. Cochran* were on the joint brief for public intervenors, Sacramento Municipal Utility District, et al.

Robert Ohlback and *Jack F. Fallin, Jr.* were on the brief for intervenor, Pacific Gas & Electric Co. *Malcolm H. Furbush* also entered an appearance for intervenor.

W. Benny Won was on the brief for intervenor, Public Utility Commissioner of Oregon.

Rigdon H. Boykin was on the brief for intervenor, American Paper Institute, Inc.

Richard K. Willard, Assistant Attorney General and *Michael Kimmel*, Attorney, Department of Justice were on the brief for *amicus curiae*, United States, urging affirmance.

James M. Johnson entered an appearance for intervenor, Washington State Department of Fisheries, et al.

Frederick H. Ritts entered an appearance for intervenor, American Public Power Association.

Before: ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, SCALIA*, STARR and BUCKLEY, *Circuit Judges*, and WRIGHT**, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge STARR*.

Dissenting opinion filed by *Circuit Judge MIKVA*, with whom *Circuit Judges ROBINSON and EDWARDS* join.

STARR, Circuit Judge: This case involves a contest for a license to operate a hydroelectric power plant in the Pacific Northwest. The legal issues generated by the contest, however, far transcend the question of which of two competitors will win the right to operate the plant in question. To the contrary, the case involves fundamental issues of the power of an administrative agency to change its interpretation of law and to take regulatory action based upon that new interpretation.

The specific issue before us is whether in competing for a license, a public entity, the Clark-Cowlitz Joint Operating Agency, was entitled to the municipal (and State) preference prescribed in section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) (1982). (The text of that provision is set out in the margin as footnote 1.)

* Judge (now Justice) Scalia was a member of the Court at the time this case was argued, but did not participate in this opinion.

** Senior Circuit Judge Wright participated in oral argument of this case, but subsequently recused himself from further participation.

¹ Section 7(a) provides as follows:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this

The Federal Energy Regulatory Commission determined that Congress did not intend the statutorily prescribed municipal preference to apply in relicensing proceedings in which, as here, the incumbent licensee was competing for the license. In reaching this determination, however, FERC overruled its contrary conclusion articulated only three years earlier in declaratory proceedings in which both Clark-Cowlitz and the incumbent licensee, Pacific Power & Light Company, participated.

The petitioner here, Clark-Cowlitz, contends that the Commission acted unlawfully in accomplishing this about-face as to parties who participated in the earlier declaratory proceedings. Initially, we are called upon to decide whether principles of preclusion or retroactivity bar FERC from applying its reinterpretation of section 7(a) in the contest between Clark-Cowlitz and Pacific Power. If we conclude that FERC is not barred, then we must consider whether FERC's new interpretation is permissible under the principles enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See also *Immigration & Naturalization Service v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987). For the reasons that follow, we hold that FERC was not precluded from applying its new interpretation

title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. § 800(a) (1982). The parties do not dispute that Clark-Cowlitz is a "municipality" for purposes of section 7(a). See *id.* § 796(7).

of section 7(a) in the present proceeding. We also uphold its interpretation as reasonable and consistent with Congressional intent. One aspect of the Commission's substantive analysis, however (apart from statutory interpretation), falls short of the standards of reasoned decision making and thus requires a remand of the case to the agency.

I

The relevant facts can be briefly stated. Pacific Power & Light Company is the incumbent licensee of the Merwin Hydroelectric Power Project. That facility is situated on the Lewis River in the State of Washington, between the Counties of Clark and Cowlitz. Pacific Power has owned, operated, and maintained the Merwin project since 1941, when Pacific Power's predecessor transferred the 50-year license originally issued in 1929 for the project to the investor-owned utility. Anticipating the looming expiration of the original license, Pacific Power filed an application for a new license in 1976. Shortly thereafter, public utility districts in Clark and Cowlitz Counties formed the Clark-Cowlitz Joint Operating Agency to compete for the Merwin license. Clark-Cowlitz filed its competing application in 1977, claiming the benefit of the municipal preference of section 7(a).

At that time, the original licenses for many other hydroelectric projects were likewise about to expire. A common issue arose as to whether States and municipalities contending for new licenses at the various projects could claim the benefit of section 7(a)'s municipal preference when *incumbent licensees* also sought new licenses for the projects. In view of the recurring nature of this issue, FERC decided to address the question in a declaratory order proceeding. See 5 U.S.C. § 554(e) (1982). Numerous parties, including Clark-Cowlitz and Pacific Power, intervened and participated in that proceeding. Then, in an opinion issued in 1980, FERC concluded that the section 7(a) municipal preference applied in *all* relicensing proceedings, including those in which incum-

bent licensees were competing to maintain authority to operate their respective projects. *City of Bountiful*, 11 F.E.R.C. ¶ 61,337, at 61,706, *reh'g denied*, 12 F.E.R.C. ¶ 61,179, at 61,459 (1980).

Not surprisingly, FERC's decision failed to win universal acclaim. No less than thirty-eight petitioners appealed the agency's decision in the *Bountiful* declaratory order proceeding to the Eleventh Circuit. That court reviewed FERC's interpretation of section 7(a) under the deferential standard that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Alabama Power Co. v. FERC*, 685 F.2d 1311, 1318 (11th Cir. 1982) (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981)), *cert. denied*, 463 U.S. 1230 (1983). Under this standard of "great deference," the court upheld FERC's interpretation as "consistent with the statute's language, structure, scheme, and available legislative history." *Id.*² The Eleventh Circuit's opinion issued in September 1982.

² The court canvassed the legislative history and concluded that it contained only "weak" support for FERC's position (that the preference applied in all relicensings, even those in which the incumbent licensee was seeking to obtain a new license for the project). *Alabama Power*, 685 F.2d at 1317. Nonetheless, it accepted FERC's assertion that its interpretation accorded with the language and structure of the statute. At the same time, it acknowledged that the contrary reading proffered by the private utilities (that the preference was inapplicable in relicensings that involved the incumbent) was also "a reasonable interpretation" of the language and structure. *Id.* at 1316. The court went on to opine in *dicta*, however, that this reading would lead to "absurd results." *Id.* at 1316-17. Specifically, it believed that the alternative interpretation championed by the private utilities gave incumbents an undue advantage and left the Commission with no "tie-breaking" preference to apply in certain situations. *Id.* But cf. *Pacific Power & Light Co.*, 25 F.E.R.C. ¶ 61,052, at 61,184-85 (1983) (asserting that no such absurd result obtained under this interpretation).

As the *Bountiful* litigation proceeded in Atlanta, however, back in Washington, D.C., FERC was busily re-evaluating its stance on the applicability of the municipal preference. The Commission ultimately concluded that its *Bountiful* interpretation was contrary to Congressional intent, and that the preference did *not* apply when, in addition to a state or municipal applicant, the incumbent licensee sought a new license for an existing project. The first notice of this reassessment appeared in a brief filed by the Solicitor General in the United States Supreme Court on the petition for certiorari in *Alabama Power*. See Brief for the Federal Energy Regulatory Commission on Petitions for a Writ of Certiorari at 8-9, *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983), Joint Appendix ("J.A.") at 95, 106-07. There, the Solicitor General urged the Court, in light of FERC's reinterpretation, to grant the petitions and remand the case to the Eleventh Circuit. The Court, however, declined the invitation and denied certiorari. *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983).

At this juncture in the rather baroque history of the municipal preference issue, we return from the *Bountiful* litigation and rejoin Clark-Cowlitz in its efforts before the Commission to secure the Merwin license. Following FERC's decision in *Bountiful*, Clark-Cowlitz, along with numerous applicants for licenses at other sites, pressed FERC to begin hearings on individual projects. As luck would have it, hearings on the Merwin relicensing were the first out of the gate; indeed, those hearings got underway only three days after the Eleventh Circuit affirmed *Bountiful*. To Clark-Cowlitz's chagrin, however, in ultimately ruling on the Merwin applications, FERC formally announced its change of mind signalled in the Solicitor General's brief before the Supreme Court. The Commission expressly overruled *Bountiful* and awarded the license to Pacific Power, the delighted incumbent. *Pacific Power & Light Co.*, 25

F.E.R.C. ¶ 61,052, at 61,174, *reh'g denied*, 25 F.E.R.C. ¶ 61,290 (1983) [hereinafter *Merwin*].

In addition to repudiating *Bountiful*, FERC went on to evaluate the specific plans of the two contestants for the *Merwin* license. The Commission found that even under *Bountiful* the municipal preference would not obtain in the *Merwin* proceedings because Clark-Cowlitz's and Pacific Power's plans were not "equally well adapted," the statutory condition precedent to applying the preference. *See supra* note 1. The Commission based this finding on the relative economic impact of awarding the license to one contestant or the other. Specifically, the Commission determined that Pacific Power would incur greater costs in securing an alternative to *Merwin* Project power than would Clark-Cowlitz. Under this analysis, Pacific Power's customers, in the aggregate, would therefore suffer more if the incumbent lost the license than Clark-Cowlitz's would gain were Clark-Cowlitz to receive it. This meant, as FERC saw it, that Pacific Power's plans for operating *Merwin* were better adapted to "utilize in the public interest the water resources of the region." 16 U.S.C. § 800(a) (1982); *see supra* note 1.

Clark-Cowlitz thereupon brought this appeal. *See* 16 U.S.C. § 825l(b). While the appeal was pending, Congress amended section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensings except the *Merwin* proceedings. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, §§ 2, 11, 100 Stat. 1243, 1255.³ What had thus shaped

³ Section 2 of the 1986 Act amends section 7(a) of the Federal Power Act, quoted in full *supra* note 1, so that 7(a) now begins as follows:

In issuing preliminary permits hereunder or *original* licenses where no preliminary permit has been issued, [and in issuing licenses to new licensees under section 808 of the title] the Commission shall

up in this litigation as a major confrontation between the advocates of public power projects, on the one hand, and the champions of private (albeit regulated) enterprise on the other, reduced on the surface to an important but nonetheless parochial struggle over the license rights to a particular project. But Congress' amendment of the statutory prescription governing new licenses for existing projects, by keeping alive the Merwin controversy, did nothing to resolve the fundamental question as to an agency's ability to change its mind about the law and to act upon its new interpretation. It is to that bedrock issue of administrative law, brought into sharp relief by this case, that we now turn.

II

Clark-Cowlitz's primary argument is that principles of *res judicata* or collateral estoppel bar FERC from applying its present interpretation of section 7(a) in the struggle between the two contestants. Clark-Cowlitz reasons that FERC is bound by the interpretation embraced in the *Bountiful* declaratory proceeding, to which both contestants for the Merwin license were parties (as intervenors).

For us to resolve this issue, it is unnecessary to plumb the depths of *res judicata* and collateral estoppel and their modern avatars, claim preclusion and issue preclusion. They have received lengthy expatiation elsewhere. See, e.g., *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984); *Nevada v. United States*, 463 U.S. 110, 128-31 (1983); *Synanon*

ECPA, § 2, 100 Stat. 1243 (additions italicized; deletions bracketed). Section 11 of the ECPA provides in relevant part:

The amendments made by this Act . . . shall not apply to the Federal Energy Regulatory Commission proceeding involving FERC Project Number 935 (FERC Project Number 2791), relating to the Merwin Dam in Washington State.

Id. § 11.

Church v. United States, No. 84-5164, slip op. at 7-8, 10-13 (D.C. Cir. June 5, 1987); *Carr v. District of Columbia*, 646 F.2d 599 (D.C. Cir. 1980); 18 *C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure* §§ 4401-4478 (1981). Suffice it to say that, in general, these doctrines are designed to invest judicial resolutions of legal controversies with finality. See, e.g., *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Examined in light of preclusion principles, Clark-Cowlitz's argument is flawed in two fatal respects.

First. Whether it travels under the rubric of issue or claim preclusion, Clark-Cowlitz's argument fails because it misreads the Eleventh Circuit's decision as having conclusively determined the same issue (or claim) that confronts us. A fundamental requisite of issue preclusion is an identity of the issue decided in the earlier action and that sought to be precluded in a later action. Similarly, to preclude a party's raising a claim, it must be shown that the claim was (or could have been) raised in a prior proceeding. See, e.g., *Gould v. Mossinghoff*, 711 F.2d 396, 398-99 (D.C. Cir. 1983); see also *Jack Faucett Associates, Inc. v. American Telephone & Telegraph Co.*, 744 F.2d 118, 124 (D.C. Cir. 1984), cert. denied, 469 U.S. 1196 (1985). The Second Restatement of Judgments makes clear the importance of these related requirements:

The principle underlying the rule of claim preclusion is that a party who *once has had a chance to litigate a claim* before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle—that one who has *actually litigated an issue* should not be allowed to relitigate it—underlies the rule of issue preclusion.

Restatement (Second) of Judgments at 6 (1982) (emphasis added); see also *Montana v. United States*, 440 U.S. at 153.

In the case at hand, the Eleventh Circuit neither addressed nor had the opportunity to address the specific issue (or claim) before us, namely the propriety of FERC's *present*, anti-*Bountiful* view that the municipal preference does *not* obtain in relicensings to which the incumbent licensee is a party. See *I.A.M. National Pension Fund v. Industrial Gear Manufacturing Co.*, 723 F.2d 944, 947-49 (D.C. Cir. 1983) (preclusion does not attach to issues not necessarily litigated or claims that could not have been raised in earlier proceeding). The Eleventh Circuit was, instead, called upon to assess the reasonableness of FERC's view enunciated in the short-lived *Bountiful* decision, namely that the preference applied in all relicensings. Its decision that *Bountiful* was both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC's recent interpretation is also reasonable and in accordance with the statute.⁴ It should go without saying that an ambiguous or broadly worded statute may admit of more than one interpretation that

⁴ It is irrelevant to preclusion analysis that in dicta the Eleventh Circuit suggested that the interpretation now taken by FERC would lead to absurd results. See *supra* note 2. Preclusion attaches only to issues the resolution of which is *necessary* to support the judgment in the first action. See, e.g., *Synanon Church v. United States*, No. 84-5164, slip op. at 7 (D.C. Cir. Jun. 5, 1987); *Jack Faucett Assocs.*, 744 F.2d at 125; *Association of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853, 860 (D.C. Cir. 1978); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4421 (1981). Under the deferential standard of review employed by the reviewing court, it had only to determine the reasonableness of FERC's prior interpretation, not the correctness of competing interpretations. The same reasoning applies if we treat Clark-Cowlitz's argument in terms of claim preclusion. The present "claim"—that FERC's present interpretation of section 7(a) is incorrect—could not have been entertained by the Eleventh Circuit before FERC adopted this interpretation. Cf. *I.A.M. National Pension Fund*, 723 F.2d at 947-49.

is reasonable and consistent with Congressional intent. See, e.g., *Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860, 2867 (1986); *Chevron v. NRDC*, 467 U.S. at 863-64; *Chisholm v. FCC*, 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); see also *Office of Communication of the United Church of Christ v. FCC*, 590 F.2d 1062, 1068-69 (D.C. Cir. 1978); cf. *ICC v. American Trucking Associations, Inc.*, 467 U.S. 354, 363-64 n.7 (1984); *Immigration & Naturalization Service v. Jong Ha Wang*, 450 U.S. 139, 144-45 (1981). That is to say, there may be more than one "right" interpretation if Congress has painted with a broad (or at least non-specific) brush so as to permit an agency flexibility in carrying out its duties.

Second. Another ground on which the municipality's preclusion argument founders is that Clark-Cowlitz and FERC were fellow travelers in the *Bountiful* proceeding. Both advanced the position, now rejected by FERC, that the municipal preference applies in *all* relicensings. Issue preclusion, however, attaches only to such issues as the parties litigated adversely to each other in the prior litigation. See, e.g., *Jack Faucett*, 744 F.2d at 125; Re-statement (Second) of Judgments § 38. Similarly, as to claim preclusion, FERC's successfully defending its position (at that time) in *Alabama Power* does not bar it from asserting a different position in the current proceedings. See, e.g., *I.A.M. National Pension Fund*, 723 F.2d at 945 & n.1. All that is precluded by virtue of FERC's earlier success is another action by the petitioners in *Alabama Power*, among whom Clark-Cowlitz was of course not to be found (being, indeed, on the opposite side), on the claim of *Bountiful's* invalidity. See *Nevada v. United States*, 463 U.S. at 134-35; Re-statement (Second) of Judgment § 19.

In summary, preclusion principles do not foreclose FERC's applying a reinterpretation of section 7(a) in

the *Merwin* proceedings.⁵ The Court of Appeals' decision in *Alabama Power* did not address the issue of the pro-

⁵ The dissent's argument that the real issue of preclusion is whether Pacific Power should be bound by *Bountiful* is, with all respect, misguided. It is true as a general matter that preclusion principles can apply to parties to administrative proceedings, but that principle is irrelevant here. The doctrine of preclusion is meant to prevent parties from rearguing issues they have already lost. But Pacific Power has never argued that *Bountiful* did not apply to it. It was the *decisionmaker*, FERC, that changed its position. Thus, to the extent preclusion analysis is appropriate at all, it is applicable to the extent that FERC participated as a party before the Eleventh Circuit. Preclusion principles are meant to provide an affirmative defense that one party to a prior proceeding may raise against another party that took an adverse position in that proceeding.

Assuming *arguendo* the appropriateness of addressing whether Pacific Power should be precluded by virtue of its participation, we would reach the same conclusion. *Bountiful* was, it must be remembered, a declaratory order proceeding, see 5 U.S.C. § 554(e), and as such was structured expressly in order to address a pure issue of law: the applicability of the municipal preference of section 7(a) to relicensing. See *Bountiful*, 11 F.E.R.C. at 61,710. It is well settled that the determination of an issue of law should not be accorded preclusive effect if such effect would result in "inequitable administration of the law." See Restatement (Second) of Judgments § 28(a); see also *Staten Island Rapid Transit Operating Auth. v. ICC*, 718 F.2d 533, 542 (2d Cir. 1983). We think that would be the precise consequence of applying preclusion in this case for the reason we discuss *infra* section III. It would grant Clark-Cowlitz a benefit which similarly situated parties—namely, the numerous other municipalities who participated in *Bountiful*—would be denied by virtue of passage of the Electric Consumers Protection Act. Correlatively, it would burden a party, Pacific Power, in a way that similarly situated parties—namely, the numerous private utilities in *Bountiful*—would not be burdened.

Moreover, the dissent's attempt to equate *Bountiful* with ordinary federal court proceedings ignores the fact that administrative proceedings vary much more widely than judicial proceedings. Since as a general matter preclusion principles

priety of FERC's present interpretation, nor could the claim that this agency interpretation was invalid have been raised before the Eleventh Circuit.

III

Since the interpretation of section 7(a) that FERC first applied in the contest between Pacific Power and Clark-Cowlitz represented a reversal of the position the Commission had espoused in *Bountiful*, it is appropriate for us to consider whether the application of its change in position was consistent with principles of retroactivity. We are persuaded that it was.

In this circuit, *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), provides the framework for evaluating retroactive application of rules announced in agency adjudications. See *Local 900, International Union of Electrical, Radio & Machine Workers v. NLRB*, 727 F.2d 1134, 1194-95 (D.C. Cir. 1984); see also *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 & n.35 (D.C. Cir. 1986). The general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it. See *NLRB v. Wyman-Gordon*, 394 U.S. 759, 765-66 (1969) (plurality opinion); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 282 (1969); *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981) ("While at one time the determination that a rule was properly established in adjudication

are to be applied more flexibly to administrative adjudications than to judicial proceedings, see generally Restatement (Second) of Judgments § 83; 4 *K. Davis* § 21:9, withholding preclusive effect as to a single party is especially justified in light of the unique nature of the *Bountiful* proceedings and the scope of participation in those proceedings by private parties.

would have compelled the conclusion that it should be applied with full retroactive effect, the accepted rule today is that in appropriate cases the court may in the interest of justice make the rule prospective.”); 4 K. Davis, *Administrative Law Treatise* § 20:8, at 30 (2d ed. 1983) (“[A]n agency having rulemaking power is forbidden by . . . *Wyman-Gordon* to make new law in an adjudication if it is to be limited to prospective effect.”); *Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094, 1114, 1115 (D.C. Cir. 1979) (reading *Bell Aerospace* as affording an agency “broad discretion to announce policy in adjudication . . . subject to an exception in a case of severe impact and justifiable reliance on contrary agency pronouncements”), *cert. denied*, 445 U.S. 920 (1980); cf. *Mullins v. Andrus*, 664 F.2d 297, 302-03 (D.C. Cir. 1980) (“[J]udicial decisions normally are to be applied retroactively.”) (footnote omitted); *National Association of Broadcasters v. FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976) (“The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect.”).

Nevertheless, a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a “manifest injustice.” See *Thorpe*, 393 U.S. at 282. The *Retail, Wholesale* court set forth a non-exhaustive list of five factors to assist courts in determining whether to grant an exception to the general rule permitting “retroactive” application of a rule enunciated in an agency adjudication:

- (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statu-

tory interest in applying a new rule despite the reliance of a party on the old standard.

Id. at 390.

The first factor of *Retail, Wholesale* recognizes that "a number of reasons call[] for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced." *Id.*; see also *Local 900*, 727 F.2d at 1195. For one thing, by granting the benefit of a change in the law to those whose efforts may have helped bring about the change, retroactive application of a new principle encourages parties to "advance new theories or . . . challenge outworn doctrines." *Retail, Wholesale*, 466 F.2d at 390. For another, the Administrative Procedure Act generally contemplates that when an agency proceeds by adjudication, it will apply its ruling to the case at hand; when, on the other hand, it employs rulemaking procedures, its orders ordinarily are to have only prospective effect. See 5 U.S.C. §§ 551(4)-(7), 553, 554; see also *Wyman-Gordon*, 394 U.S. at 764. Inasmuch as *Merwin* was the first proceeding in which FERC announced its reinterpretation, the first *Retail, Wholesale* factor points in favor of retroactive application.⁶

⁶ The *Retail, Wholesale* court somewhat misleadingly refers to this first factor as an inquiry whether the agency adjudication at issue is one of "first impression." This nomenclature contains within it seeds of confusion, insofar as it differs from the more typical understanding of the term as referring to situations in which an agency confronts an issue that it has not resolved before. See, e.g., *SEC v. Chenery*, 332 U.S. 194, 202-03 (1947). Nonetheless, this potential confusion is quickly dispelled upon examination of the facts of *Retail, Wholesale*. There the *Retail, Wholesale* court labeled the case before it one of second impression and on that basis distinguished it from the agency decision, *The Laidlaw Corporation*, 171 NLRB No. 175 (June 13, 1968), in which the NLRB first overruled a well-established rule to the contrary. In discerning this distinction, the court clearly labelled *Laidlaw* a case of "first impression" for purposes of analysis under the first

The second factor requires the court to gauge the unexpectedness of a rule and the extent to which the new

factor, even though *Laidlaw* addressed an issue which the agency had addressed before:

First, while the Supreme Court has observed in *Chenery* that "[E]very case of first impression has a retroactive effect . . .," this is not a case of first, but of second impression. The case in which the rule in question was adopted by the Board was *Laidlaw* itself, and, although the Seventh Circuit upheld its application to the employer there, it must be recognized that "[t]he problem of retroactive application has a somewhat different aspect in cases not of first impression but of second impression."

466 F.2d at 390 (footnotes and citations omitted). It could not be clearer that *Laidlaw* was not a decision of the sort typically referred to as one of "first impression"—that is, it was not the first time that the NLRB had ever addressed the issue (whether an employer had to seek out affirmatively and offer reinstatement to employees replaced during an unfair labor practice strike). Rather, *Laidlaw* was one of "first impression" in a different sense, namely that it decided for the first time that employers did in fact have a duty to seek out and offer to reinstate such employees. In announcing this rule, the *Laidlaw* decision squarely overruled numerous NLRB decisions that had addressed this same issue but reached the opposite result. *Id.* at 387-88 & n.17. Thus, the dissent misinterprets the term "first impression" as used in *Retail, Wholesale* in concluding that *Merwin* was "a classic example of a case of second impression." Dissent at 5. *Merwin* clearly qualifies as a case of first impression under the *Retail, Wholesale* analysis, which, the dissent acknowledges, is the "seminal case fixing the law of the circuit for retroactive application of agency adjudications." *Id.* at 2.

The dissent goes on to suggest that the first factor of *Retail, Wholesale* loses meaning if a case enunciating a new rule is viewed as a case of "first impression." *Id.* at 5. But the apparent conceptual oddity disappears when one focuses not upon the nomenclature, which is indeed misleading, but on the concept which the *Retail, Wholesale* court was seeking to convey. And that point was well captured by the court's observation that *parties who challenge old doctrines should be rewarded for bringing about the change in the law*. That is,

principle serves the important but workaday function of filling in the interstices of the law. It implicitly recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view. See, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 495-502 (1968); see also *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966). But here, FERC's prior interpretation of section 7(a) cannot in reason rise to the level of a "well established practice." For one thing, application of the prior interpretation was never a "practice." *Bountiful* was, after all, FERC's sole pronouncement on an issue that had lain dormant for almost fifty years. Indeed, the entire purpose of the declaratory order proceeding was to provide a forum for resolving this emerging issue. For another thing, the Commission's ruling in that solitary proceeding can scarcely be viewed as "well established." The reader will recall that judicial review of *Bountiful* had not even concluded when FERC changed its mind as to the meaning of section 7(a).⁷

to deny the fruits of victory to those who bring about a change in the law "might have adverse effects on the incentive of litigants to advance new theories or to challenge outworn doctrines." *Id.* at 390. Thus, we are convinced that the dissent, with all respect, has been misled by the admittedly misleading nomenclature employed by the *Retail, Wholesale* court, and has overlooked the real point—the first factor points in favor of retroactive application of a rule in the adjudication in which the new rule or principle is announced. Odd as it may seem to the dissent, the first factor tends by its nature to cut in favor of retroactive application of a new principle. That factor, however, can obviously be counterbalanced by the weight of the other factors, which boil down, as we shall presently see, to a question of concerns grounded in notions of equity and fairness.

⁷ Consideration of *Hanover Shoe*, 392 U.S. 481, illustrates the fundamental defect in the dissent's analysis of this case under the second *Retail, Wholesale* factor. In *Hanover Shoe*,

Now it is true that, by virtue of *Bountiful's* existence, FERC was not "required by the very absence of a previous standard" to confront the issue raised in *Merwin* and to supply a rule. *Retail, Wholesale*, 466 F.2d at 391. The second factor thus favors retrospective application less than would be the case in situations where formulation of a rule is necessary to "fill[] in the interstices of the [statute]," *id.* (quoting *SEC v. Chenery*, 332 U.S. at 202-03). On the other hand, FERC's need to apply its reinterpretation in *Merwin* was more compelling than those in which an agency shifts its position solely as a result of a change in agency policy. Here, FERC was

the Court assessed whether "a party ha[d] significantly relied upon a clear and established doctrine" so as to warrant non-retroactive application of a judicially articulated rule concerning the law of monopolization. *Id.* at 496. It surveyed case law extant when the rule was first clearly announced and determined that there was no "sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Id.* at 499. Just as the second *Retail, Wholesale* factor looks to whether there has been a departure from past practice, 466 F.2d at 390, the *Hanover Shoe* Court's use of terms like "line of authority" and "current of the law" demonstrates that retroactivity analysis must consider the "longstanding" nature of the displaced prior rule. And that is why a holding of nonretroactivity, as urged by the dissent, cannot be premised on a *single*, recent agency decision (*Bountiful*) that is still in the throes of litigation when it is overruled. It is precisely those situations in which a preexisting rule has withstood the test of time and been faithfully applied or explicitly reaffirmed that justifiable reliance may exist. To this extent, the dissent's suggestion, Dissent at 6, that the three-year interval between *Bountiful* and *Merwin* is somehow comparable to the seven years of decisions overruled by the *Laidlaw* decision at issue in *Retail, Wholesale*, see *supra* note 6, is simplistic and misleading. The prior rule at issue in *Retail, Wholesale* had been applied and confirmed in at least six decisions over those seven years, 466 F.2d at 387 n.17 (listing cases), five of which held up to judicial review. That is a far cry from the situation here.

animated by the conviction that its prior interpretation thwarted Congressional intent; to make bad matters worse, the prospect loomed that an erroneous interpretation would be locked in for a generation, embodied in licenses that would last well into the Twenty-First Century. See *Chisholm v. FCC*, 538 F.2d at 364 (agency's discretion to change its course is broader when agency believes its prior course is contrary to statutory design); see also *Chenery*, 332 U.S. at 203 ("[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design . . ."). On balance, it seems to us that the second factor weighs against granting an exception to the general rule of retrospective application.

Next, in evaluating possible reliance on *Bountiful*, we can see little if any period during which Clark-Cowlitz would reasonably have relied on FERC's earlier interpretation. Both the formation of Clark-Cowlitz and its initial efforts toward securing the Merwin license occurred before *Bountiful* was rendered, at a time when the applicability of the municipal preference to relicensing proceedings had not been resolved.⁸ Obviously, no reliance could have preceded *Bountiful*. Thereafter, Clark-Cowlitz might optimistically have viewed *Bountiful*'s interpretation as at least tentatively settled after the Eleventh Circuit's favorable decision. But, upon analysis, a sanguine view as to *Bountiful*'s permanence would necessarily have been short-lived, for only six months elapsed between the Eleventh Circuit's decision

⁸ In fact, prior to *Bountiful*, the only indication of how this legal issue would be resolved cut against a municipality's reliance on the availability of the preference. That indication had come in 1967, when the General Counsel of the Federal Power Commission, FERC's predecessor, informed Congress that the FPC interpreted section 7(a) to withhold the municipal preference in relicensing proceedings in which the incumbent licensee was seeking the license. See *Bountiful*, 11 F.E.R.C. at 61,722-23.

in November 1982 and May 1983, when the Solicitor General revealed FERC's about-face. See FERC's Brief in Support of Petitions for Certiorari at 8-9, J.A. at 106-07. Any reliance on agency fidelity to *Bountiful* after this development would manifestly have been unreasonable, inasmuch as the agency had concluded (and announced) that its prior reading was wrong as a matter of law.⁹

In sum, viewed most favorably to Clark-Cowlitz, the period during which it could have relied on FERC's prior

⁹ The dissent's attempt to ignore the significance of this disclosure and maintain that the overruling of *Bountiful* was "completely unforeshadowed," Dissent at 9, blinks at reality. The Solicitor General's certiorari brief clearly and unequivocally foreshadowed *Bountiful*'s demise when it gave notice to Clark-Cowlitz as well as the Court that "a majority of the [FERC] Commissioners . . . expressed their disagreement with the Commission's earlier position [in *Bountiful*]" and that "the Commission now wishes to reconsider the case [*Bountiful*], and . . . a majority of the Commissioners appear to be ready to overrule [*Bountiful*] and adopt the contrary position." Solicitor General's Brief in Support of Certiorari at 8-9, J.A. at 106-07. In light of this clear indication that *Bountiful* was in mortal danger, it is irrelevant for purposes of gauging reasonable reliance that the Commission, as a litigation matter, expressed concern over the possible binding effect of *Bountiful*. This latter concern was merely that; it scarcely negates the expression of intent to overrule *Bountiful*. What is more, this articulated concern must be viewed in its context, namely as part of the Commission's litigation strategy. It cannot be overlooked that at that juncture the Commission was fervently seeking to convince the Supreme Court that the case was worthy of the Court's attention. Thus, assuming *arguendo* that Clark-Cowlitz expended time and money toward securing a hearing after May 1983 (when the Solicitor General revealed the Commission's forthcoming change in interpretation), that effort simply cannot be said to have been in "reasonable reliance" on the continued vitality of *Bountiful*. We are thus left with whatever efforts born of optimism may have taken place over six months, which the dissent itself describes as "admittedly . . . modest." Dissent at 7.

interpretation spanned no more than six months. Moreover, the presumably sunny prospects for *Bountiful's* vitality during this brief period were beclouded in some measure by knowledge of possible Supreme Court review (or, at a minimum, the likelihood of an effort by the incumbent licensee and other private utilities to secure Supreme Court review). We have discovered no legal authority (nor do we see in logic any reason) to support carving out an exception to the rule of retroactivity based on reliance on an agency interpretation so briefly embraced. *Cf. Retail, Wholesale*, 466 F.2d at 387 & n.17 (prior interpretation applied in numerous decisions over at least seven years). Although hope springs eternal, hope is no surrogate for reliance.

Clark-Cowlitz's situation fares no better under the fourth *Retail, Wholesale* factor, to wit, the degree of burden which a retroactive order imposes. As a result of FERC's change in interpretation, Clark-Cowlitz lost the benefit of what is admittedly a highly attractive procedural advantage in competing for a hydroelectric power license. Nevertheless, Clark-Cowlitz obviously retained the unfettered right to compete for the license. It was simply forced to do so on the same terms as non-municipal applicants, entitled to the license only if it proved that its plans were "best adapted to develop, conserve, and utilize in the public interest the water resources of the region." 16 U.S.C. § 800(a). Thus, the situation "is not [one] in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements. Nor are fines or damages involved here." *Bell Aerospace*, 416 U.S. at 295. Measured against the burdens weighed in other cases, the burden imposed on Clark-Cowlitz is, as we see it, marginal at best. *Cf. Local 900*, 727 F.2d at 1195 (upholding retroactive application that resulted in imposition of money damages).¹⁰

¹⁰ For reasons stated in the text, the dissent is wrong to describe the effect of retroactive application as "[d]epriva-

The fifth and final factor—the statutory interest in applying a new rule despite the reliance of a party on the old standard—likewise favors retrospective application. Withholding retroactive application would grant Clark-Cowlitz a 30-year benefit to which FERC now believes it is not entitled. The overriding Congressional interest in ensuring that the best qualified contestant (as FERC sees it) operate hydroelectric power projects, in other words, would not be fulfilled at the Merwin site for three decades.¹¹ This 30-year delay looms large when

tion of that license,” Dissent at 10, since Clark-Cowlitz still could have received the license if it had been better qualified than Pacific Power. Moreover, the dissent ignores the bedrock fact that Clark-Cowlitz *never received a license*. All Clark-Cowlitz ever had was a favorable ruling from an ALJ, which was subject to plenary review by the full Commission. Finally, it is worth emphasizing that although Clark-Cowlitz was, as the dissent notes, formed for the express purpose of seeking the Merwin license, its failure to obtain that license was a risk it undertook knowingly; the Authority was formed, after all, when prevailing authority suggested that it was entitled to no preference. *See supra* note 8.

¹¹ We are puzzled by the dissent’s discounting FERC’s view of Congress’ interest with respect to hydroelectric relicensings. *See* Dissent at 12. FERC did, after all, reach its decision as a result of a careful examination of the relevant statutory framework and legislative history surrounding it; it was not engaging in policy making. We are, of course, obliged when Congress’ intent is not clear and unambiguous to defer to an agency’s reasonable interpretation of that intent. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844–45 (1984); *see also INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1220–21 (1987); *Clarke v. Securities Indus. Ass’n*, 107 S. Ct. 750, 759–60 (1987); *United States v. Riverside Bayview Homes*, 106 S. Ct. 455, 461 (1985); *Chemical Mfrs. Ass’n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985). Equally important, Congress’ statutory interest in awarding the license to the best qualified applicant, an interest discerned by the Commission in an interpretation that we consider reasonable, *see infra* section IV, would not be fulfilled at least at the Merwin site for three decades

measured against whatever optimism Clark-Cowlitz may have felt during the six months between judicial affirmation of *Bountiful* and revelation of FERC's disavowal of that briefly held position.

In addition to application of the *Retail, Wholesale* analysis, we discern yet another consideration in favor of permitting FERC to apply its reinterpretation. To hold otherwise would grant Clark-Cowlitz the benefit of a

if nonretroactive application of *Merwin* is required. The need immediately to announce and apply its reinterpretation of *Bountiful* obviously occurred to FERC, as is evident from the outset of the *Merwin* decision. FERC acknowledged that "it [did] not matter whether the municipal preference . . . [was] applied [to the case before it] because the Commission is in full agreement that the plans of PP&L are better adapted than those of [Clark-Cowlitz] and, consequently, that there [was] no tie." This overruling was obviously necessary because after the round of relicensings then under way, no more adversary relicensings would take place for three decades, as all the parties to *Bountiful* and *Merwin* were undoubtedly aware. Since eight of the "future" relicensings were already pending, as FERC noted, if the Commission had decided to postpone announcing its overruling of *Bountiful*, or to withhold retroactive application, its new interpretation would not be applied to nine different sites for thirty years. The dissent now appears to criticize FERC for not considering singling out Clark-Cowlitz for nonretroactive application of *Merwin* at the expense of the eight other applicants. See Dissent at 12. We believe that this was hardly an "obvious alternative," cf. *Yakima Valley*, 794 F.2d at 746. For one thing, as we discuss in the text, Clark-Cowlitz demonstrated no unique degree of reliance or hardship sufficient to justify such disparate treatment. For another, this alternative was not so "obvious" as to occur to Clark-Cowlitz itself, which argued in its petition for rehearing that FERC was bound to apply *Bountiful* to all parties to *Bountiful*, comprising "virtually the entire investor-owned utility industry and a substantial number of publicly-owned utilities." See Clark-Cowlitz's Request for Rehearing of Opinion No. 191, at 10 (Nov. 4, 1983), J.A. at 708, 725; see also *id.* at 17-19, J.A. at 732-34 (discussing retroactivity principles without suggesting that Clark-Cowlitz should be singled out for favorable treatment).

municipal preference that Congress, by enacting the ECPA, has seen fit to deny to all other municipal applicants. Yet eight of these applicants had applications pending at the time when FERC announced its decision to overrule *Bountiful*. As a result of FERC's reassessment, eight other applicants suffered disappointment differing from that experienced by Clark-Cowlitz only by what appear to be evanescent shades of gradation. We can see nothing warranting the singling out of Clark-Cowlitz for this boon solely because its application was the first to proceed to the hearing stage.¹²

To the contrary, the more equitable approach would be to treat Clark-Cowlitz like the other similarly situated municipal applicants, which, no one disputes, can no longer claim the benefit of the municipal preference in the wake of the ECPA. See, e.g., *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 714-16 (1974). And it should not go unnoticed that equal treatment is exactly what Clark-Cowlitz has been asking for all along, contending, for example, that it "and every other party [to *Bountiful*] reasonably relied on the assertion of FERC" in *Bountiful*. Petitioners' Brief at 31.

IV

This brings us at last to the substantive heart of the petition for review: the propriety in law of FERC's determination that no municipal preference applies in relicensing proceedings in which the incumbent licensee is

¹² We in no way suggest that Congress' most recent legislation controls our decision concerning Clark-Cowlitz's entitlement to the municipal preference. We recognize that in enacting the ECPA Congress deliberately left to this court resolution of the pending controversy involving FERC and Clark-Cowlitz. See, e.g., H.R. Rep. No. 507, 99th Cong., 2d Sess. 16-17 (1980); see also *supra* note 3. We only emphasize that considerations of fairness, which lie at the heart of exceptions to the general rule of retroactivity, militate against treating Clark-Cowlitz differently from the many similarly situated municipalities subject to Congress's enactment.

seeking to remain on the project. Confronted with an agency's interpretation of the statute that Congress has charged it with administering, we must first employ the traditional tools of statutory construction to determine whether Congress has spoken directly to the precise question at issue. If Congress has not addressed the precise question, or if it has addressed the issue but done so ambiguously, the question becomes whether the agency's interpretation is a reasonable (or permissible) one. *See, e.g., Cardoza-Fonseca*, 107 S. Ct. at 1220-22; *Chevron v. NRDC*, 467 U.S. at 844; *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984). Upon analysis of the statute, we are persuaded that Congress has not in this instance clearly and specifically addressed the role of the municipal preference in relicensings and that FERC's interpretation of section 7(a) should be upheld as reasonable.

The focus of this dispute is the language of two provisions of the Federal Power Act. Section 7(a) of the Act, 16 U.S.C. § 800(a), which is set forth *supra* note 1, creates a preference for municipal applicants. It specifies three situations in which the preference applies: when the Commission is (1) "issuing preliminary permits" under section 5 of the Act, *id.* § 798; *see also id.* § 797 (f); (2) "[issuing] licenses where no preliminary permit has been issued"; and (3) "issuing licenses to new licensees under section 808 of this title."

The third category of section 7(a) is the only one arguably applicable here because the proceedings before the Commission were relicensing proceedings carried out under section 15 of the Act, 16 U.S.C. § 808, the provision to which section 7(a) makes express reference. Indeed, Clark-Cowlitz concedes that neither the first nor the second situation obtains here. Petitioner's Brief at 34. That, then, brings us to section 808 (section 15 of the Federal Power Act), which concerns relicensing proceedings. It provides in pertinent part as follows:

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Id.

FERC determined that the third (and final) situation described in the municipal preference clause of section 7(a) did not govern the proceedings before it. *Merwin*, 25 F.E.R.C. ¶ 61,052. It reasoned that Pacific Power was an "original licensee," not a "new licensee," within the meaning of section 15. Under this analysis, the Commission was not "issuing [a] license[] to a new licensee," under section 7(a). *Id.* § 800(a). Rather, it was issuing "a new licensee to the original licensee."

The Commission thus relied on the statutory distinction in section 15 between an "*original licensee*" and a "*new licensee*." *Id.* § 808(a) (emphasis added). The Commission further found that this interpretation, man-

dated by the terms of sections 7 and 15, was inconsistent with neither the structure of the Act nor its legislative history. By virtue of this analysis, the Commission concluded that its contrary view in *Bountiful* was "legally erroneous." Having interpreted the municipal preference clause not to apply in relicensings involving "original licensees," the Commission considered the relevant standards to be contained in the second clause of section 7(a), which applies "as between other applicants." *Id.* § 800(a). Thus, in FERC's view, any relicensing in which one of the applicants was an incumbent (or more precisely, "original") licensee was a proceeding "between other applicants."

In our view, the Commission's new interpretation (withholding the municipal preference in relicensing proceedings in which the *original* licensee is involved) represents a reasonable reading of the statute. Indeed, to embrace the contrary interpretation the reader must modify either the statute or the facts in one of two ways; (1) by characterizing Pacific Power, the incumbent, as a "new licensee" when it is in fact the "original licensee"; or (2) by rewording the provision to mandate application of the municipal preference when "*entertaining applications for a license to a new license.*" 16 U.S.C. § 800(a).

Both approaches do violence to the terms of the statute. The first ignores the distinction in section 808(a) between "original licensees" and "new licensees." Indeed, the first approach renders surplusage the concept of "original licensee," an act of judicial surgery which should be avoided when means are at hand to save the entire statute. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982); *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980). The second approach ignores the fact that the provisions distinguish between "issuing" a license and "entertain[ing] applications for" a license. *Compare id.*

§ 808(a) *with id.* § 807(b).¹³ Congress would, it seems to us, likely have employed the latter term in § 800(a) had it intended to refer to the process of receiving applications for the issuance of a license to a new licensee.¹⁴ Thus, compared to the competing interpretation championed by Clark-Cowlitz, FERC's reading has the substantial virtue of giving meaning to *all* of the words of the statute and depending *only* on the words that Congress employed in drafting it. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Market Co.*

¹³ Section 807(b) provides in relevant part as follows:

No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title . . .

16 U.S.C. § 807(b).

¹⁴ The dissent misreads our opinion "to say that FERC can first decide to whom to award a license and *then* apply the municipal preference to the formal act of issuing the license," Dissent at 17. Not so. As FERC reads section 800(a), the municipal preference applies only in relicensing proceedings in which the Commission is "issuing a license to a new licensee," which can only include contests among applicants who are not "original licensees." This reading by the expert agency does not, as the dissent would have it, require application of the preference only after the decision is made as to who gets the award. The Commission obviously knows from the outset whether an original licensee is participating in the proceeding. Employing its misreading of our opinion, the dissent then attempts to justify modifying the language of section 800(a). The dissent would twist the statute so as to trigger the municipal preference in *any* relicensing proceeding in which a state or municipality has filed an application to become a new licensee—i.e., where the Commission is "entertaining" an application, 16 U.S.C. § 807(b), *supra* note 13, for the issuance of a license to a new licensee. We believe FERC's contrary interpretation is at least as reasonable as, if not preferable to, an interpretation that requires amending the statute to add language that Congress saw fit to leave out of this provision and chose to use elsewhere, indeed in a neighboring provision. *See id.*

v. Hoffman, 101 U.S. (11 Otto) 112, 115-16 (1879). In addition, FERC's approach construes the phrase "issu[ing] a license to a new licensee" in section 7 of the Act to have the same meaning as that phrase does in section 15, the provision expressly incorporated in section 7. *Cf. Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

On the other hand, the merit of FERC's present interpretation is not entirely free from doubt. Specifically, it is in tension with the opening phrase of the second clause of section 7(a), "as between other applicants."¹⁵ Clark-

¹⁵ We need not dwell at length on the dissent's belief that this particular portion of section 7(a), 16 U.S.C. § 800(a), yields an "obvious" meaning. *See* Dissent at 17. We think the susceptibility of this provision to varying but reasonable interpretations is suggested by the fact that interpretation of this provision has, so far (1) been the subject of two lengthy and careful Commission decisions reaching contrary results; (2) provided a subject of fierce debate among "virtually the entire" industry, *see* Clark-Cowlitz's Rehearing Petition, *supra* note 11, at 10; and (3) led to judicial review by this court sitting *en banc* with differences of opinion.

As for the "more subtle" problem that the dissent purports to discern in FERC's interpretation of section 7(a), that "problem" is nothing more than a recasting of the dissent's *first problem* concerning the phrase "as between other applicants," which we acknowledge in the text to be ambiguous. The dissent asserts that "a proceeding cannot arise under the second half of [section 7(a)]," Dissent at 17, which is itself a remarkable proposition inasmuch as it appears to deny meaning to fully one-half of the provision. It appears to us that under either of the competing interpretations a relicensing proceeding in which no municipality was involved would require application of the second half of section 7(a). But in any event, in asserting that the first half of section 7(a) covers all possible proceedings, the dissent simply presumes the correctness of its interpretation, namely that "new licensees" includes "original licensees." Such judicial presumptions are not, with all respect, in keeping with *Chevron* principles.

Cowlitz's argument—that the municipal preference (in the first clause of section 7(a)) applies in any contest between a State or municipality and a private entity, and that the second clause applies “between other applicants,” i.e., in relicensing proceedings between any two private entities, including original licensees—is not without force. This interpretation arguably gives a more natural reading to the phrase “between other applicants”; on the other hand, it suffers from the shortcomings adumbrated above.

Fortunately, we are not without guidance in this unhappy (but hardly unfamiliar) situation of plausible competing interpretations of statutes. The Supreme Court only recently reminded us that a court cannot substitute what it considers the “more natural” construction of an ambiguous statute for a reasonable interpretation advanced by an agency. See *Young v. Community Nutrition Institute*, 106 S. Ct. 2360, 2364-65 (1986); see also *Cardoza-Fonseca*, 107 S. Ct. at 1220 n.29; *Chevron v. NRDC*, 467 U.S. at 842-44. Since it is beyond cavil that section 7(a) is reasonably susceptible to the interpretation proffered by FERC, we are duty bound to uphold it.

Nothing in the legislative history warrants upsetting this construction of the statute. As a general matter, the legislative history in this respect is not especially illuminating; indeed, the “legislative history here as usual is more vague than the statute we are called upon to interpret.” *United States v. Public Utilities Commission*, 345 U.S. 295, 320 (1953) (Jackson, J., concurring); see also *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 107 S. Ct. 1855, 1859-60 (1987). It certainly points in no specific direction. On the one hand, the history favoring Clark-Cowlitz's position is, to quote the Eleventh Circuit's charitable characterization, “weak.” *Alabama Power Co.*, 685 F.2d at 1317. On the other hand, some portions of the history provide modest, albeit scarcely overpowering, support for FERC's present posi-

tion.¹⁶ But what does appear beyond question is that resort to the legislative history yields no "compelling indications" of the sort necessary to overturn an agency's reading that is in harmony with the express language of the legislation. See, e.g., *Burlington Northern*, 107 S. Ct. at 1860; *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985); *CBS*, 453 U.S. at 382; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-68 (1980); see also, e.g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). But cf. *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986).

Finally, FERC's interpretation accords with the broader purposes animating Congress, to the extent those purposes can fairly be discerned from the structure and terms of the statute itself. The statutory mechanism provides for long-term licenses, at the end of which the United States or a subsequent licensee may, in effect, "buy out" the original licensee. This approach recognizes the need on the part of private capital for stability and a return on investment, see, e.g., *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 605 (1944); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1176 (D.C. Cir. 1987), and, at the same time, the need to safeguard the public interest, which is, of course, the agency's *raison d'être*. FERC's view of the limited circumstances in which the municipal preference is available is, we believe, consistent with this balancing of competing interests. Municipalities are entitled to a preference in relicensing over all other applicants when the incumbent licensee does not seek a new license. When, on the other hand, the original licensee seeks a renewed license, the municipality must show that it is better adapted than the incumbent if it is to unseat the original licensee. While

¹⁶ The Commission canvassed this lengthy, largely inconclusive history in both *Bountiful*, 11 F.E.R.C. at 61,712-25 (1980), and *Merwin*, 25 F.E.R.C. at 61,180-84, J.A. at 620-26.

the Act confers no "renewal expectancy," as is the case in the FCC's stewardship over broadcast licenses, neither does it, as the Commission reads the statute, obliterate 50 years of investment, improvement and administration of a project by conferring a special preference based entirely on the identity of the entity seeking to unseat the incumbent. Far from being an "absurd result," FERC's view of the statute appears reasonably to accommodate the public and private interests taken into account by the Act.

V

Having determined that the Commission could properly jettison *Bountiful* and apply its new interpretation of section 7(a) in the contest between Clark-Cowlitz and Pacific Power, we confront two final, related issues: *first*, whether FERC could properly take into account the relative economic impacts of an award to one or the other contestant; and *second*, if so, whether the Commission's assessment of these impacts avoids the APA's proscription of "arbitrary" and "capricious" agency action. 5 U.S.C. § 706(2)(A). We are satisfied that FERC may include in its deliberations consideration of the economic consequences of the grant of a license. We are unable to conclude, however, that FERC's consideration of those consequences in the *Merwin* proceedings passes muster as reasoned decision making.

A

Under the standards governing review of agency interpretations of statutes, *see supra* text at 26, we have no difficulty in upholding FERC's interpretation as a permissible construction. As we have already discussed, FERC properly could, consistent with *Chevron* principles, consider the *Merwin* proceedings as arising under the latter half of section 7(a). That portion of the statute provides:

[A]s between other applicants, the Commission may give preference to the applicant the plans of which

it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

Although it is certainly arguable that the economic impacts of an award are not factors properly subsumed within consideration of competing applicants' plans, two aspects of the language support FERC's position that it was nonetheless permissible to consider these impacts. First, in contrast to the initial part of 7(a), the second half contains the permissive verb "may." To be sure, "may" can sometimes express the language of command. See, e.g., *Commonwealth v. Lynn*, 501 F.2d 848, 854 & n.21 (D.C. Cir. 1971); cf. *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977). Nevertheless, the fact that Congress saw fit to employ "shall" in the first clause of section 7(a) powerfully suggests that the distinction has meaning—that its use of "may" in the second clause was intended to vest in FERC, in proceedings "between other applicants," the discretion to consider factors extrinsic to the applicants' plans. Cf. *United States v. Hohri*, 55 U.S.L.W. 4716, 4717 (U.S. June 1, 1987). In addition, the second clause of section 7(a) does not, like the first, contain a provision permitting applicants under certain circumstances to modify their plans to be "equally well adapted" as those of competing applicants. The presence of this provision in the municipal preference clause tends to suggest that relicensing decisions under that clause should be based exclusively on the plans themselves. The absence of this provision in the second clause buttresses the Commission's view that in proceedings like the one at hand, section 7(a) does not force FERC to close its eyes to factors extrinsic to the plans of the license applicants.

Further support for the Commission's interpretation is found in section 10(a) of the Federal Power Act, which prescribes a broad public interest inquiry to guide

the Commission in crafting conditions for licenses.¹⁷ As FERC persuasively argues, the breadth of the public-interest inquiry permitted under section 10(a) should inform the interpretation of section 7(a)'s directions as to who should hold the license.

Finally, deferring to the Commission's expertise in technical, economic considerations is consistent with venerable case law interpreting sections 7 and 10 of the Act. *See, e.g., National Hells Canyon Association v. FPC*, 237 F.2d 777, 779-80 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) (noting that recurrence in sections 7(b) and 10(a) of the phrase "in the judgment of the Commission" emphasizes Commission's broad discretion); *see also United States ex. rel. Chapman v. FPC*, 345 U.S. 153, 171 (1953) (judgments about technical and economic issues committed to Commission's discretion).

In sum, we believe the Commission reasonably interpreted the statutes governing licensing of hydroelectric projects to permit considerations of the economic consequences of its award. We turn, then, to the Commission's application of this interpretation.

B

In addition to attacking FERC's authority to take economic impacts into account, petitioner faults the Commission's assessment of these impacts. We are constrained to agree.

¹⁷ Section 10(a) of the Federal Power Act provides in relevant part as follows:

All licenses issued under this subchapter shall be on the following conditions:

(a) . . . That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for beneficial public uses, including recreational purposes

16 U.S.C. § 803(a).

The Commission focused solely on the consequences of its decision on the customers of Pacific Power and Clark-Cowlitz. *See Merwin*, 25 F.E.R.C. at 61,196-201. Assessing the long-term impacts of the decision confronting it, FERC found that if it awarded the license to Clark-Cowlitz, Pacific Power would ultimately be forced to replace the lost Merwin power with much more expensive power, either from thermal generating facilities that Pacific Power would have to construct or from power supplied by the Bonneville Power Administration at its so-called "New Resources" rate. *Id.* at 61,197-98. In contrast, Clark-Cowlitz could, if it failed to obtain the Merwin license, service its customers with additional purchases from Bonneville at the latter's preferential "Priority Firm" rate. Thus, although precise calculation was impossible, it was clear that Pacific Power's alternative costs would greatly exceed those of Clark-Cowlitz. Moreover, in the short term, the decrease in Clark-Cowlitz's cost of power in the event of an award to it paled in comparison to the increased cost of power Pacific Power would incur in that event. *Id.* at 61,198. In general, the Commission found, these impacts would be passed along to customers of the two entities. Balancing the heavy cost increase that a significant portion of Pacific Power's customers would absorb as against the more modest benefits Clark-Cowlitz's would receive should the latter obtain the license, FERC determined to place the license in Pacific Power's hands. *Id.* at 61,201.

The Commission's analysis, upon reflection, overlooks important aspects of the problem before it. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). To be sure, the Commission rightly perceived that measurable dislocation would flow from unseating Pacific Power from the Merwin project. We also recognize the commonsense force of FERC's taking into account Clark-Cowlitz's access as a municipal entity to federally subsidized Bonneville

power. Nevertheless, the Commission's truncated analysis raises as many questions as it answers.

For one thing, the Commission's analysis would appear invariably to favor the *status quo* and (other things being equal) all but guarantee an award to the incumbent licensee where a competing State or municipal applicant has preferential access to subsidized power. This seems to transmogrify the second clause of section 7(a)—which, as we have seen, contemplates an award to the best-suited applicant, regardless of identity—into a virtual *per se* (or at least strong) preference favoring the incumbent.

For another, the Commission's exclusive focus on the customers of the two contestants blinds it to economic ramifications meriting its consideration. Specifically, the Commission appears to have ignored the fact that an award to Clark-Cowlitz would (presumably) free up low rate ("Priority Firm") Bonneville power for other customers in the Pacific Northwest. Thus, countervailing the detriment to Pacific Power's customers was not only the benefit to Clark-Cowlitz's customers, but also the benefits presumably accruing to other power customers in the region. The third element of the equation, however, is entirely missing from the balance struck in the Commission's decision.

Finally, FERC's dispositive emphasis on the dislocation attendant to unseating an incumbent licensee appears not to take into account the fact that the energy needs of the region and available sources of power within the region remain constant regardless of which applicant ultimately secures Merwin license. It would seem, in other words, that shifting the control of a single power source in the region does not alter the energy landscape of the region. Subsidized Bonneville power will still exist even if Clark-Cowlitz uses less of that power and replaces it with power from the Merwin project. The benefits (in the form of lower rates) from Bonneville power will presum-

ably remain and find their way to consumers in the region, albeit to different groups of consumers (depending obviously on which applicant receives the Merwin license).

Our observations in this respect should not, however, be misconstrued or overread. We emphatically do not require FERC to embrace any particular economic theory from the range of rational approaches. What we do require is that the Commission come to grips with the obvious ramifications of its approach and address them in a reasoned fashion.

VI

To summarize our holding, we conclude that neither preclusion nor retroactivity principles prevented FERC from abandoning in the *Merwin* relicensing proceedings the interpretation of section 7(a) it adopted in *Bountiful*. Furthermore, this later interpretation is consistent with Congressional intent embodied in the Federal Power Act and is otherwise reasonable. We conclude, however, that the Commission's analysis of the relative economic impacts of its award of the Merwin license is insufficient to pass muster under the APA. We therefore remand this case to the Commission for further elucidation of its determination that Pacific Power's higher alternative costs justified awarding the license to it. Its order in all other respects is hereby affirmed. See 16 U.S.C. § 825l(b).

Judgment Accordingly.

MIKVA, *Circuit Judge*, with whom *Circuit Judges* ROBINSON and EDWARDS join, *dissenting*: In the seven years since the Federal Energy Regulatory Commission (FERC) determined, with apparent finality, that the municipal preference embodied in the Federal Power Act, 15 U.S.C. § 791(a) *et seq.* (1982), applies to relicensing proceedings, this case has been beset by an unusual and extended series of twists and turns, confounding the parties as well as this court. In permitting FERC to overrule its prior holding and apply its new interpretation retroactively to petitioner Clark-Cowlitz Joint Operating Agency (Clark-Cowlitz), this court today adds its own contribution to the tortuous unfolding of this case. The majority's conclusions are marred at every step by skewed articulation of the facts and warped application of the law. The court today manages in one opinion to do violence to principles of preclusion, retroactivity, and statutory interpretation. I dissent.

I.

A. *Retroactivity Doctrine and Administrative Adjudications*

The largest part of the court's opinion is devoted to its finding that FERC's application of its reversal of field to the parties in *Pacific Power & Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,052, *reh'g denied*, 25 F.E.R.C. (CCH) ¶ 61,290 (1983) ("*Merwin*"), was consistent with principles of retroactivity. The court begins its analysis by citing a "general principle" that retroactive application of a new interpretation announced in an agency adjudication is favored, and prospective application is permissible only if necessary to avoid a "manifest injustice." Majority opinion (Maj. op.) at 14-15. There is no such general principle under the law. Courts reviewing an agency's attempt to retroactively apply a new policy announced in an administrative adjudication must make an independent determination whether "the

inequity of retroactive application [is] counterbalanced by sufficiently significant statutory interests." *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). This determination incorporates neither a presumption of retroactive application nor a presumption of prospective application. Rather, as the Supreme Court has made clear, it involves a straight-word balancing test in which the ill effect of retroactive application is weighed against the damage to the statutory design caused by prospective application. See *SEC v. Chenery*, 332 U.S. 194, 203 (1947). It is highly inappropriate for this court to transform this test by adjusting the scales in favor of retroactive application. Moreover, the "manifest injustice" test to which the court refers comes from *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), a case that is completely inapposite. In *Thorpe*, the Court found that it would not be manifestly unjust for the agency to apply a new standard that *already had been established* at the time of the proceeding. The equities are far sharper, and the legal test quite different, when an agency seeks to apply a new standard to the parties to the very adjudication in which the reversal is announced.

As the majority recognizes, the seminal case fixing the law of the circuit for retroactive application of agency adjudications is *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972). In *Retail, Wholesale*, this court refused to give retroactive effect to a new rule adopted in the course of a National Labor Relations Board adjudication. The court listed five factors which courts must put into the balance in determining whether a decision should have retroactive effect:

- (1) whether the particular case is one of first impression,
- (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law,
- (3) the extent to which the party against whom the new rule is applied relied on the former rule,
- (4)

the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail, Wholesale, 466 F.2d at 390. These considerations provide in the context of agency adjudication a way to attend to the principal concerns of retroactivity analysis —“lack of notice and the degree of reliance on former standards.” *Id.* at 390 n.22. The *Retail, Wholesale* test attempts to reconcile the interests of the litigants with the overall public interest in effectuation of a statutory scheme: retroactive application is appropriate only if the court is satisfied that the prejudice to parties who justifiably relied on the previous standard is outweighed by the need to advance the statutory purpose which the new rule will serve. See *McDonald v. Watt*, 653 F.2d 1035, 1045 (5th Cir. 1981); *Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C. Cir. 1983).

The *Retail, Wholesale* test is specifically adapted to the unique circumstances of agency attempts to retroactively apply a new policy announced in an administrative adjudication. Although the principles of retroactive application of judicial decisions serve as a general guide in the context of administrative adjudications, 4 K. Davis, *Treatise on Administrative Law* § 20.7, at 23 (2d ed. 1983); see *Daughters of Miriam Center for the Aged v. Matthews*, 590 F.2d 1250, 1259 (3rd Cir. 1978), analysis of administrative decisions is colored by agencies' ability to announce new policy via either adjudication or rulemaking. On the one hand, the agency needs and enjoys considerable discretion in choosing which vehicle is the more appropriate for formulating new standards in a given case. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). On the other hand, this flexibility means that an agency is less justified in relying upon adjudication to impose new standards of conduct retroactively, because the agency, unlike courts, has the option to promulgate a rule prospectively and thereby

avoid imposing burdens on parties who have relied on the prior standard. See *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.); Bonfield, *The Federal APA and State Administrative Law*, 72 Va. L.R. 297, 330 (1986).

Several additional principles emerge from cases in which this court has reviewed agency decisions applying a new standard retroactively. First, whether a new standard should be applied is a question of law. Agencies possess no particular expertise on the issue of retroactivity, and reviewing courts in turn have "no overriding obligation of deference" to an agency's decision to give retroactive effect to a new rule. *Retail, Wholesale*, 466 F.2d at 390. Second, agency decisions to apply an order retroactively must be the product of rational analysis, and "the law requires that an agency explain . . . how it determined that the balancing of the harms and benefits favors giving a change in policy retroactive application." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986). Third, an agency's failure to consider the less drastic alternative of prospective application may be considered arbitrary and capricious and thus constitute grounds for reversal. *Id.*

B. Application

Applying the *Retail, Wholesale* test to the facts of this case compels the conclusion that FERC should not have applied its reversal of policy to Clark-Cowlitz. The first *Retail, Wholesale* factor—whether the particular rule is one of first impression—is anchored in a recognition that "the problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966); see *Retail, Wholesale*, 466

F.2d at 390. Thus, when an agency already has considered the issue and established a firm rule, a court is more likely to require prospective application of the agency's reinterpretation. We have here a classic example of a case of second impression. As the majority observes, *see* Maj. op. at 5, three years before the orders under review, the Commission convened a special declaratory proceeding for the explicit purpose of resolving the municipal preference issue. It then adopted a clearcut interpretation of section 7(a), and ordered the parties to proceed on the basis of that interpretation. This factor thus weighs squarely on the side of prospective application.

The majority concludes that "inasmuch as *Merwin* was the first proceeding in which FERC announced its reinterpretation, the first *Retail, Wholesale* factor points in favor of retroactive application." Maj. op. at 16. This conclusion is, simply put, baffling. The majority flatly misinterprets the use of the term "first impression" in *Retail, Wholesale*. Of course *Merwin* was the first proceeding in which FERC announced its reversal; retroactivity analysis assumes that the decision at issue changed the law. *See Retail, Wholesale*, 466 F.2d at 389 (retroactivity analysis permits courts to determine whether to grant or deny retroactive force to *newly established* rules). Thus, the first factor does not look to whether the very decision at issue had ever been articulated before; such an inquiry would make the first factor meaningless. Rather, the court was inquiring whether the agency had previously decided the underlying issue and was now seeking to depart from its previous resolution. Moreover, the court cited the very language from the Supreme Court's opinion in *Chenery* which the majority concedes contains "the more typical understanding of the term [first impression] as referring to situations in which an agency confronts an issue that it has not resolved before." Maj. op. at 16 n.6. Finally, the court in *Retail, Wholesale* noted that it was reviewing "not a case

of first, but of *second* impression." *Retail, Wholesale*, 466 F.2d at 390 (emphasis added). The majority thus has indulged in a tendentious and utterly fanciful re-writing of this part of the *Retail, Wholesale* opinion.

The second *Retail, Wholesale* factor requires the court to determine "whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law." *Retail, Wholesale*, 466 F.2d at 390. If the new rule falls into the former category rather than the latter, it impinges on the "principal concern of [retroactivity analysis]—lack of notice and the degree of reliance on former standards." *Id.* n.22. The Commission's about-face in *Merwin* falls more naturally into the first category rather than the second. Unlike the agency in *Chenery*, in which retroactive application was allowed, FERC was not "filling in the interstices of the Act." 332 U.S. at 202. Rather, as in *Retail, Wholesale*, in which retroactive application was refused, it was announcing a 180-degree turnaround from a prior clear standard. See *Retail, Wholesale*, 466 F.2d at 391. The Commission previously had given careful consideration to the issue—conducting an unprecedented full day of oral argument—and then determined unanimously that the municipal preference applies to relicensing proceedings. The majority points out that only three years elapsed in this case between the agency's initial determination and its subsequent reversal, whereas the interval in *Retail, Wholesale* was seven years. Besides the fact that the difference in intervals is hardly dramatic, the majority's position falsely equates "well established" with "longstanding." The firmness of a precedent may, but need not, be connected to its longstandingness. Indeed, the majority's assumption that more recent precedent is somehow "soft" is inimical to the rule of law. In this case, the question had been conclusively settled when the Commission announced a sudden and complete reversal of field. Thus, the second factor also cuts in favor of prospective application.

The third *Retail, Wholesale* factor is the extent of Clark-Cowlitz's reliance on the Commission's decision in *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) ¶ 61,337 (June 27, 1980), *reh'g denied*, 12 F.E.R.C. (CCH) ¶ 61,179 (Aug. 21, 1980) ("*Bountiful*"). This third factor also counsels in favor of prospective application. The majority concludes that Clark-Cowlitz could only have reasonably relied on the prior interpretation until May of 1983, when the Solicitor General revealed FERC's dissatisfaction with the result in *Bountiful*. Such a degree of reliance admittedly would be modest, although not impalpable. However, Clark-Cowlitz's reliance reasonably extended considerably beyond May of 1983. To see why this is so, it is necessary to fill in somewhat the majority's statement of facts, which omits a few critical details that demonstrate that Clark-Cowlitz's reasonable reliance on the *Bountiful* decision was significant.

In its unanimous decision in *Bountiful*, the Commission included an order that all pending relicensing applications "go forward in light of this declaratory order." 11 F.E.R.C. (CCH) ¶ 61,337 at 61,736. In accord with the Commission's directive, Clark-Cowlitz filed in October of 1980 the first of two motions requesting a hearing on the Merwin license. The Commission also specifically declined to postpone the hearing pending judicial review of *Bountiful*. See J.A. 289. Thus, although the majority discounts them, Clark-Cowlitz's preliminary efforts after the successful resolution of *Bountiful* were certainly in reasonable reliance on (indeed, mandated by) the *Bountiful* decision, and in fact they enabled Clark-Cowlitz to become the first (and, given subsequent events, the only) municipal applicant to proceed to a hearing in a competitive relicensing proceeding.

Three days after the decision of the Eleventh Circuit (before whom the Commission strenuously and successfully defended its position in *Bountiful*), the *Merwin* hearing convened. Both parties agreed that the municipal preference applied to the *Merwin* proceeding and focused

only on the remaining statutory issue under 7(a)—whether the two entities were “equally well adapted to conserve and utilize the water resources of the region.” Joint Statement of Major Contested Issues, *reprinted in* J.A., at 298-300. Clark-Cowlitz’s efforts at this hearing therefore also were taken in reliance on *Bountiful*. The Administrative Law Judge concluded that the two applicants were equally well adapted to conserve and utilize the region’s water resources. He therefore applied the municipal preference and entered an order awarding the license to Clark-Cowlitz. Pacific Power immediately appealed to the Commission on the ground that it was the superior candidate and therefore deserved the license notwithstanding the municipal preference.

To this point the *Merwin* controversy had been an unremarkable outgrowth of the Commission’s original decision in *Bountiful*; with Clark-Cowlitz having gone a fair way towards securing the license, however, the case began to take on unusual convolutions. The Commission had undergone a substantial change in personnel following the 1980 election. Three days before the ALJ’s decision in *Merwin*, the reconstituted Commission met in secret session. See *Clark-Cowlitz Joint Operating Agency v. FERC*, 798 F.2d 499 (D.C. Cir. 1986). As the Commission later revealed, at that closed meeting a majority of the Commissioners registered disagreement with their predecessors’ decision in *Bountiful*. They voted to ask the Solicitor General to recommend that the Supreme Court grant the private utilities’ pending petitions for certiorari and remand the case to the Commission. See Brief for the Federal Energy Regulatory Commission on Petitions for a Writ of Certiorari at 8, *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983), *reprinted in* J.A. 106, at 107. A principal reason for this request was the Commission’s conviction that if certiorari were denied, the *Bountiful* decision would be binding as to applicants who par-

ticipated in *Bountiful* under principles of *res judicata*. See *id.*, J.A. at 106-07. The Solicitor did not comply precisely with the Commission's request. Instead, he urged the Supreme Court to remand the case to the Eleventh Circuit for reconsideration in light of "intervening circumstances"—to wit, the fact that "a majority of the Commissioners, four of whom were appointed after the issuance of [*Bountiful*], expressed their disagreement with the Commission's earlier position in these orders." *Id.*, J.A. at 106. The Supreme Court, however, denied certiorari. See *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983).

The denial of certiorari might have appeared to quiet any potential argument against granting Clark-Cowlitz a license to operate the Merwin Project. A majority of the Commission, however, decided to continue to pursue its opposition to the municipal preference. In its review of the ALJ's decision in *Merwin*, the Commission, in a 3-2 decision, simply overruled *Bountiful*. 25 F.E.R.C. (CCH) ¶ 61,052 (Oct. 7, 1983). Although the majority obscures this vital fact, the Commission's volte-face was completely unforeshadowed: the *Bountiful* interpretation had never been challenged during the course of the *Merwin* litigation, the parties had not briefed it, and the Commission had given no indication that the issue might even be open for reconsideration.

The above scenario differs materially from that obtaining in other proceedings in which a rule is changed. Normally parties will be on notice that the previous interpretation is subject to revision in that proceeding; any reliance on the old standard in the party's litigation efforts therefore would be unreasonable. Here, however, the parties had no notice that FERC considered *Bountiful* to be open for reconsideration in *Merwin* and thus reasonably proceeded on the assumption that the municipal preference applied. Moreover, the Commission's request for certiorari only made it more reasonable to rely on

Bountiful, because the Commission had indicated that the municipal preference certainly would apply to pending relicensing proceedings if the Court denied the application, as it did. Thus, under the unusual facts of this case, Clark-Cowlitz's efforts during the course of the *Merwin* proceeding must also be counted as part of its reasonable reliance on the Commission's decision in *Bountiful*.

In the three years between the Commission's proclamations in *Bountiful* and *Merwin*, Clark-Cowlitz relied on the established standard to a degree unique among the many municipal suitors for expiring licenses. Clark-Cowlitz was the only municipal applicant to proceed to hearing in a competitive relicensing proceeding. The municipality's efforts to get the Commission to schedule a hearing, as well as the two-year course of the *Merwin* proceeding, entailed a substantial outlay of time and money. Clark-Cowlitz participated in voluminous discovery, engaged experts in several fields, prepared memoranda and four briefs (none of which addressed the supposedly settled municipal preference issue), and presented its case in prehearing conferences and the actual hearing before the ALJ. This reliance was significant, especially for a municipal applicant of limited resources. The third *Retail, Wholesale* factor therefore cuts distinctly in favor of prospective application.

The degree of burden which the retroactive order imposes on Clark-Cowlitz, the fourth *Retail, Wholesale* factor, also counsels in favor of prospective application. Clark-Cowlitz is a municipal corporation formed for the express purpose of seeking the *Merwin* license. Deprivation of that license—the effect of applying the Commission's order retroactively—is therefore quite a severe hardship for the municipality. It thwarts the single purpose which is quite literally Clark-Cowlitz's *raison d'être*.

The first four factors, which gauge the litigants' personal interest in not being judged under a newly announced standard, thus present a fairly compelling

case for prospective application. Although there is room for reasonable disagreement as to the force of some of these factors in the instant case, the important point, which the majority fails to recognize, is that whatever the impact of the first four factors, retroactive application is appropriate only if the court finds that the first four factors are counterbalanced by the fifth factor—the statutory interest in applying a new rule. “Unless the burden of imposing the new standard is *de minimis*, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect.” *Retail, Wholesale*, 366 F.2d at 392. *See id.* at 390 (“courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests.”); *see also Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984) (“The statutory interest in applying the new rule despite individual reliance is, of course, the crucial consideration in the context of requiring an agency to apply one of its rules retroactively.”). In this case, the majority makes no such finding, nor could it, because there is no statutory interest in retroactive application.

Normally, of course, assuming a new interpretation is not unfaithful to the statutory scheme, there will be some statutory interest in retroactive application, and the court must weigh that interest against the ill effects of retroactivity. *See Chenery*, 332 U.S. 194, 203 (1947). In this respect, however, as in so many others, this case is a true *rara avis*. The current statutory scheme *specifically disavows* any interest in denying Clark-Cowlitz the benefit of the municipal preference. With the Electric Consumers’ Protection Act, Congress has amended the Federal Power Act so as to remove the municipal preference

from all pending relicensing proceedings with one explicit exception: the Merwin project. See 100 Stat. 1243 § 11. Congress has pointedly informed us, with truly unusual specificity, that it has no preference one way or the other as to whether Clark-Cowlitz receives the benefit of the municipal preference. Thus, retroactive application of the Commission's decision in *Merwin* could not possibly advance any statutory benefit to offset the considerable harm it would do to Clark-Cowlitz. Cf. *Mullins v. Andrus*, 664 F.2d 297, 304 (D.C. Cir. 1980) (no statutory objectives to be served where new statutory machinery is in place). Moreover, in this respect, as in respect to its degree of reliance, Clark-Cowlitz is unique among the many municipalities that participated in *Bountiful*.

The majority nevertheless concludes that there is a statutory interest in retroactive application. The majority reasons that, "[w]ithholding retroactive application would grant Clark-Cowlitz a 30-year benefit to which FERC now believes it is not entitled. The overriding Congressional interest in ensuring that the best qualified contestant (as FERC sees it) operate hydroelectric power projects, in other words, would not be fulfilled at the Merwin site for three decades." Maj. op. at 23 (emphasis added). But this no more than restates FERC's decision adverse to Clark-Cowlitz. It in no way speaks to Congress' interest in having the new standard apply retroactively to Clark-Cowlitz. If the agency can simply reiterate its decision on the merits as the statutory interest in retroactive application, then the fifth *Retail, Wholesale* factor is meaningless. In fact, it is our province to determine whether retroactive application advances the statutory interest, and in this case there is an extraordinarily clear answer in the text of the amended Federal Power Act: retroactive application of FERC's interpretation in no way advances Congress' statutory design.

Finally, it must be noted that the majority is not deferring to the Commission's reasoning for applying

Merwin retroactively. The Commission offered no reasoning at all. It simply applied its unanticipated reversal to Clark-Cowlitz without giving any consideration whatsoever to prospective application. Indeed, the Commission gave no thought to prospective application even though it determined to overrule *Bountiful* "so that the correct preference provision will be applied in *future relicensing proceedings*." *Merwin*, 25 F.E.R.C. ¶ 61,052, at 61,177 (emphasis added). In supplying reasoning for the Commission, the majority completely ignores that "the law requires that an agency explain . . . how it determined that the balancing of harms and benefits favors giving a change in policy retroactive application." *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986). The court at the very least should reverse and remand to the agency for an explanation of its decision. On this ground alone, today's decision is manifestly unjust.

In sum, this is a case in which "the prospectivity side of the scale [is] full and the retroactivity side empty." *McDonald v. Watt*, 653 F.2d 1035, 1046 (5th Cir. 1981). Moreover, the Commission did absolutely nothing to fulfill its legal obligation to explain why it opted for retroactive application. Under such circumstances, the Commission's application of its new interpretation to Clark-Cowlitz can only be adjudged to be the type of retroactivity which is condemned by law.

The majority also rejects Clark-Cowlitz's argument that principles of collateral estoppel dictate that it have the benefit of the municipal preference in the competition for the *Merwin* license. My objection to this section of the majority opinion is less with its conclusions than with its premises. In deciding that FERC did not become bound to apply the municipal preference by virtue of the Eleventh Circuit's decision in *Alabama Power v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983), the court is attacking a paper tiger. The more important and interesting issue for purposes of pre-

clusion doctrine is whether Pacific Power & Light is precluded from reaping the benefit of FERC's volte-face by virtue of FERC's decision in *Bountiful*. I conclude that Pacific Power & Light is so precluded and that Clark-Cowlitz, having once successfully litigated the municipal preference issue with respect to its pending application for the Merwin license, cannot now be denied the fruits of its earlier victory.

The guiding principle for application of preclusion doctrine to agency adjudications is that "res judicata applies when what the agency does resembles what a trial court does. Such a resemblance or lack of it applies to determinations of law as well as to determinations of fact." K. Davis, 4 *Administrative Law Treatise* 52 (2d ed. 1983). *Bountiful*, it will be remembered, was a separate declaratory proceeding that progressed to final judgment. If the *Bountiful* declaratory proceeding had taken place in federal court, as it certainly could have, the litigants would be bound by the ultimate determination that the municipal preference applies in relicensing proceedings. That is not to say that a court—or in this case FERC—could not later, subject to the principles of stare decisis, decide to adopt the opposite view. But such a subsequent revision could not change the original outcome as to the original parties. If parties' fates could be so put at the mercy of subsequent revision, it would decimate the policies that preclusion doctrine is designed to advance: protection from the vexation and expense of repetitious litigation, promotion of confidence in the conclusiveness of decisions, and, especially, securing of peace and repose of society. Thus, while FERC may be entitled to change its interpretation of the Federal Power Act, its ability to revise its view does not extend to undoing the preclusive effect of a declaratory order resolving a ripe controversy.

As the majority points out, underlying the rule of issue preclusion is the principle that "one who has actually litigated an issue should not be allowed to relitigate it."

Restatement (Second) of Judgments 6 (1982). Yet Clark-Cowlitz and Pacific Power & Light did actually litigate the municipal preference issue in *Bountiful*. Clark-Cowlitz and Pacific Power & Light were competitors in a pending relicensing hearing that was suspended to resolve the municipal preference issue in a declaratory proceeding. The two parties litigated vigorously—all the way to the Supreme Court—with the reasonable expectation it would resolve the crucial issue in their ongoing controversy. Thus, Clark-Cowlitz and Pacific Power & Light have been afforded an adequate opportunity to litigate a ripe claim before an administrative tribunal. This court therefore does violence to the principles underlying preclusion doctrine by permitting Pacific Power & Light not to be bound by the decision in *Bountiful*.

The majority argues in one of its footnotes that preclusion should not apply because it was FERC, and not Pacific Power, that changed its position:

Thus, to the extent preclusion analysis is appropriate at all, it is applicable to the extent that FERC participated as a party before the Eleventh Circuit.

Maj. Op. at 13 n.5. FERC is the *named party* in the Eleventh Circuit proceedings and participated fully as it had to do. The issue of municipal preference went to final judgment, and certiorari was denied. Everybody, including FERC, Pacific Power and Clark-Cowlitz, assumed that with the denial of certiorari the issue of municipal preference was finally resolved as to Clark-Cowlitz. The majority's effort to rebut this point raises sophistry to a new pinnacle—surpassed only by the alternative position advanced by the court to justify in general the curious procedures of FERC. If we allowed preclusion, says the court, it would benefit Clark-Cowlitz over the other municipalities that participated in *Bountiful*—and burden Pacific Power over the other utilities involved in *Bountiful*. The court even cites the reason for

such disparity, but gives it no weight: the passage by Congress of a law which *specifically* put Clark-Cowlitz and Pacific Power in a category separate from the other parties. It is appropriate that such a rebuttal to the dissent's concerns is expressed in a footnote.

The court's decision also will greatly undermine parties' confidence in the valuable tool of administrative declaratory proceedings. See 5 U.S.C. § 554(e) (1982). Henceforth, parties will be justifiably concerned that such proceedings, even of the scope and effort that characterized *Bountiful*, may in fact be mere dress rehearsals whose result as to the parties is subject to complete reversal in a subsequent adjudication. The court's result thus works a substantial disservice to both preclusion doctrine and administrative law.

III.

The question of the merits of FERC's reinterpretation of the Federal Power Act has been rendered virtually academic by virtue of the Electric Consumers' Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243. While carefully excepting the controversy at bar from its provision, Congress now has provided that the municipal preference will not apply to future relicensing proceedings. The majority's analysis of the unamended Federal Power Act, however, suffers from two flaws so substantial that I must dissent from that portion of the opinion as well.

First, in upholding FERC's new interpretation, the majority relies heavily on the distinctions between *entertaining applications* for a license—i.e., the process of selecting a licensee—and the process of actually *issuing* a license. The majority suggests that section 7(a) of the Act must be read to refer to the latter process in order to give full meaning to the statute. In fact, such a reading leaves the statute meaningless. The municipal preference obviously is intended to be used in the decision-

making process as a tiebreaking device to select one licensee from among equally well-adapted candidates. It makes no sense to say that FERC can first decide to whom to award a license and *then* apply the municipal preference to the formal act of issuing the license. The municipal preference must come into play in determining which candidate wins the competition, not in awarding the prize. The majority's analysis on this point is untenable.

The second flaw in the majority's review comes in its determination that the *Merwin* proceeding arose under the second half of section 7(a)—the "as between other applicants" clause. The majority already has detailed one problem with its interpretation: the second clause of 7(a) refers to "other applicants." The obvious meaning of this phrase is "applicants other than municipal entities," and Clark-Cowlitz is a municipal entity. But there is a more subtle, although no less significant, problem with the majority's analysis. A careful reading of section 7(a) demonstrates that a proceeding cannot arise under the second half of that provision. Section 7(a) first specifies three situations to which it pertains. It then instructs FERC how to proceed in any of these situations, depending on the identity of the applicants. Those instructions are: 1) if an equally well-adapted state or municipality is among the applicants, award it the license; 2) as between other applicants, the Commission may give preference to the best-adapted candidate as defined in the clause. In short, the "as between other applicants" clause refers back to the three situations section 7(a) addresses; it is not a general catch-all clause designed to cover any and all other situations. Thus, FERC's decision to rely on the "as between other applicants" clause as a separate jurisdictional provision, and the court's deference to that decision, are at odds with Congress' statutory scheme.

IV.

The rule of law is premised on a concept of reliance. Courts and policymakers have struggled to give full measure to that concept, while recognizing that the results are not always comfortable for society. Retroactivity conflicts are particularly acute when an administrative agency seeks to balance the need for flexibility and change in the administrative law sector with the parties' right to rely on what the agency has said and done previously. Here FERC generated considerable reliance on a rule it then proceeded to reverse without notice. The retroactive application of its new standard to Clark-Cowlitz was unlawful and unreasoned. It also violated well-established principles of preclusion doctrine. Finally, it was premised on a statutory interpretation that at least in some respects was unreasonable. Although Congress' recent amendment to the Federal Power Act has greatly diminished the scope of the dispute, the court today works a grave disservice to the one municipal applicant who still has a right, preserved by statute, to have its application decided under FERC's prior interpretation.

I dissent.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2231

CLARK-COWLITZ JOINT OPERATING AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

**PEOPLE OF THE STATE OF CALIFORNIA, et al.,
PACIFIC POWER & LIGHT COMPANY,
EDISON ELECTRIC INSTITUTE,
SACRAMENTO MUNICIPAL UTILITY DISTRICT, et al.,
PACIFIC GAS & ELECTRIC COMPANY,
PUBLIC UTILITY COMMISSIONER OF THE STATE OF OREGON,
WASHINGTON STATE DEPARTMENT OF FISHERIES, et al.,
AMERICAN PAPER INSTITUTE, INC.,
CITY OF SANTA CLARA, CALIFORNIA, et al.,
AMERICAN PUBLIC POWER ASSOCIATION, INTERVENORS**

**Petition for Review of an Order of the
Federal Energy Regulatory Commission**

Argued October 18, 1984

Decided October 22, 1985

Christopher D. Williams, with whom *Robert L. McCarty* was on the brief, for petitioner.

Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission, with whom *Arlene P. Groner*, Attorney, Federal Energy Regulatory Commission, was on the brief, for respondent.

Hugh Smith, with whom *Thomas H. Nelson* was on the brief, for intervenor Pacific Power & Light Company.

James M. Johnson for intervenors Washington State Department of Fisheries, et al.

Robert C. McDiarmid, *Daniel I. Davidson*, *Frances E. Francis*, *Marc R. Poirier*, *G. Philip Nowak* and *Charles I. Cochran* for intervenors Sacramento Municipal Utility District, et al.

James B. Liberman, *Ira H. Jolles* and *Peter B. Kelsey* were on the brief, for intervenors Edison Electric Institute.

Rigdon H. Boykin was on the brief for intervenor American Paper Institute, Inc.

W. Benny Won was on the brief for intervenor Public Utility Commissioner of the State of Oregon.

Frederick H. Ritts and *Mark D. Nozette* were on the brief for intervenor American Public Power Association.

J. Calvin Simpson entered an appearance for intervenor People of the State of California, et al.

Robert C. McDiarmid and *Frances E. Francis* entered an appearance for intervenor City of Santa Clara, California, et al.

Malcolm H. Furbush entered an appearance for intervenor Pacific Gas & Electric Co.

Before: *ROBINSON*, Chief Judge, and *WRIGHT* and *IKVA*, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* MIKVA.

Opinion concurring in part filed by *Circuit Judge* WRIGHT.

MIKVA, *Circuit Judge*: This case involves a contest over a license to run a major hydroelectric power project in the state of Washington. Its significance, however, extends substantially beyond the instant dispute and raises important questions about the meaning of § 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) (1982), the significance of the definitive precedent interpreting it, and the binding effect of a decision rendered by one of our sister circuits. The resolution of these questions is of considerable importance to the future of hydroelectric power and the nation's utility industry.

Clark-Cowlitz Joint Operating Agency ("Clark-Cowlitz") petitions for review of two Federal Energy Regulatory Commission ("FERC" or "Commission") orders which overturned an Administrative Law Judge's ("ALJ") decision awarding Clark-Cowlitz the license to operate the Merwin Hydroelectric Power Project. After a hearing, the ALJ had determined that the two applicants were "equally well-adapted" to operate the project. Then, relying upon a major FERC decision, *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) ¶ 61,337 (June 27, 1980), *reh'g denied*, 12 F.E.R.C. (CCH) ¶ 61,179 (Aug. 21, 1980), *aff'd sub nom. Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983) (*Bountiful*), which declared the "municipal preference" applicable to relicensings, the ALJ had awarded the new license to the public applicant, Clark-Cowlitz, rather than its rival, the incumbent private applicant Pacific Power & Light Company ("Pacific Power").

On review, the Commission abruptly announced that *Bountiful* was wrong and that the Commission was not bound to follow it. The Commission asserted that *Boun-*

tiful's affirmance by the United States Court of Appeals for the Eleventh Circuit was irrelevant. Equally irrelevant, it claimed, was the fact that the Supreme Court had denied certiorari despite a specific request from the Solicitor General detailing FERC's change of position. Also allegedly irrelevant was the fact that both Merwin applicants had intervened in the *Bountiful* proceeding. The Commission also asserted that, in any event, because of "broad economic considerations," the two applicants were not equal. Clark-Cowlitz argues that (1) the Commission was bound by res judicata or collateral estoppel and could not overrule *Bountiful* with respect to the parties, (2) the *Bountiful* interpretation of the statute is, in fact, the correct one, and (3) that FERC's 'economic impacts' analysis is unreasonable on its face and arbitrary as applied. We find Clark-Cowlitz's contentions substantially correct. Accordingly, we reverse and remand to the Commission for proceedings consistent with this opinion.

FACTS

This case derives from a dispute as to which of two entities is entitled to the license to operate the Merwin Hydroelectric Power Project. Merwin is a dam situated on the Lewis River between Clark County and Cowlitz County, Washington. Merwin creates a reservoir covering about 4,000 acres and containing more than 400,000 acre feet of water and has a capacity of approximately 136 million watts.

Petitioner Clark-Cowlitz is a municipal corporation created for the purpose of seeking the license in question here. It represents a joint effort of the public utilities districts of Clark County and Cowlitz County. Clark-Cowlitz's constituent entities are in charge of electrical distribution in their respective counties and currently receive the bulk of their electricity from the Bonneville Power Administration ("BPA"). If Clark-Cowlitz

were to secure the Merwin license, Merwin would supply all its electrical needs and it would no longer need to buy power from BPA. Clark-Cowlitz is a "municipality" within the meaning of the Federal Power Act.

Intervenor Pacific Power is a private corporation and the project's incumbent licensee. It took over the original 50-year license from another private corporation, Inland Power and Light Company ("Inland"). As licensee, Pacific Power has transmitted energy from the project to six states but has not served the communities in the vicinity of the dam. Were Pacific Power to fail in its efforts to have its license renewed, it would be forced to seek alternative sources of supply. Pacific Power does not meet the Federal Power Act's definition of a "municipality."

Like numerous other hydropower projects across the nation, Merwin was originally licensed in the 1920's (specifically 1929) for a 50-year period. Also like other projects, as a result of the absence of a public entity willing and able to undertake the project, Merwin was licensed to a private corporation, Inland. In 1941, the license was transferred—with Commission approval—to Pacific Power. The license was scheduled to expire in 1979. Consequently, in 1976, Pacific Power filed an application for renewal. Shortly thereafter, Public Utility District No. 1 of Clark County and Public Utility District No. 1 of Cowlitz County formed Clark-Cowlitz and filed a competing application.

Numerous other licenses were scheduled to expire at or about the same time as Merwin. Although in many cases the incumbent's application for relicensing was unopposed, in a substantial number, as here, public entities expressed interest in competing. These public entities noted and invoked the statute's "municipal preference" provisions. Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) (1982). It immediately became

apparent that the preference provisions would be the decisive issue in those cases. One public entity, the City of Bountiful, Utah, recognized that the viability of its application for a project would turn on the municipal preference issue and that an adverse ruling on that issue would render litigation of other issues virtually superfluous. Accordingly, Bountiful moved for a declaratory determination that the municipal preference applied in relicensings. Other parties who were facing relicensing proceedings in which municipal preference would be determinative moved to intervene in that proceeding. All the applications for intervention were granted. In effect, Bountiful and the intervenors sought separate trials; a first trial in which the issue of law common to all the proceedings would be definitively resolved; and then individual trials in each case to resolve the largely factual questions which would determine whether the applicants were in fact equally well adapted. The Commission agreed that the proposed format was both appropriate from a legal point of view and desirable from the standpoint of consistency and efficiency. The municipal preference issue was exhaustively briefed and the Commission conducted an unprecedented full day of oral argument. The Commission then ruled unanimously that the municipal preference did apply in all relicensings, including those involving incumbent licensees. The private entities petitioned for rehearing but their request was unanimously denied. The private entities then petitioned for review in the United States Court of Appeals for the Eleventh Circuit.

As soon as the Commission rendered its unanimous decision in *Bountiful*, Clark-Cowlitz began pressing FERC to schedule its Merwin application for a hearing as soon as possible. Three days before the proceedings were to begin, the United States Court of Appeals for the Eleventh Circuit handed down its decision affirming *Bountiful*. The Eleventh Circuit found FERC's conclusion

(that the statutory municipal preference applied to all relicensing as well as to original licensing) correct. The court went a step further and noted that the alternative interpretation urged by the private utilities would lead to "absurd" results. *Alabama Power Co. v. FERC*, 685 F.2d 1311, 1318 (11th Cir. 1982).

The applicability of the municipal preference was therefore regarded by both parties as established, and the issue was not litigated in the Merwin proceeding. Neither Clark-Cowlitz nor Pacific Power contested the applicability of *Bountiful*. Neither requested that the Commission overrule it. In fact, Pacific Power explicitly conceded that *Bountiful* was binding on the Merwin proceeding. The sole dispute, then, was whether the parties were "equally well adapted to conserve and utilize the water resources of the region." Joint Statement of Major Contested Issues, reprinted in J.A. at 298-300. The issues in the case, according to the parties' statement, included a comparison of the competing applicants as to power generation, electric and hydraulic coordination, flood control, fishery and wildlife protection and recreation. Additionally, the ALJ was asked to consider "the scope of the Commission's public interest review" and "whether the Commission should take into account the economic effects of issuing the license." At the conclusion of the hearing, the ALJ determined that the two applicants were equally well adapted. He then applied the municipal preference and concluded that the license must go to Clark-Cowlitz rather than the incumbent.

Following the ALJ's decision, Pacific Power appealed immediately to the Commission contending that it was superior, not equal, to Clark-Cowlitz and that consequently the municipal preference should not have been applied.

In the meantime, the private utilities in *Bountiful* had petitioned for certiorari and, following the 1980 election, the Commission had undergone a substantial

change in personnel. The new Commission members met in secret session (*see Clark-Cowlitz Joint Operating Agency v. FERC*, No. 83-2111 (D.C. Cir. Oct. 22, 1985)) to consider their litigation strategy with respect to the petition for certiorari in the *Bountiful* case. At the closed meeting, the Commission made a policy decision to shift its support on the *Bountiful* question to the private utilities, to oppose the agency's own prior decision, and to ask that the Solicitor General inform the Supreme Court of the agency's changed viewpoint and request that the petitions for certiorari be granted and the matter be remanded to the Commission. The Solicitor General declined to comply precisely with the Commission's request. Instead, his brief stated:

We are informed that at this [litigation strategy] meeting, a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A [*Bountiful*], expressed their disagreement with the Commission's earlier position in those orders. At the conclusion of the meeting, the Commission voted to request the Solicitor General to recommend to this Court that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration.

...

The Solicitor General believes that, given the importance of the question, [and] the apparent changes in the views of the Commission . . . the court of appeals should itself be given an opportunity to reconsider the case

Brief for the Federal Energy Regulatory Commission on Petitions for a Writ of Certiorari at 8-9, *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983), reprinted in J.A. at 106-07. Accordingly the Solicitor General requested that the petition be granted but that the matter be remanded to the Eleventh Circuit, rather than the

Commission. Despite this request, the Supreme Court unanimously denied certiorari. *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983).

After the Supreme Court denied certiorari, the Commission ruled on Pacific Power's appeal in the Merwin matter. The Commission not only agreed with Pacific Power but went a step further and expressly overruled *Bountiful*. The Commission placed its discussion of *Bountiful* and the municipal preference at the very beginning of its opinion. The Commission noted that it "could be argued that this part of the decision . . . is gratuitous and *obiter dictum* . . . [but] we could not agree with such an argument." Rather, the Commission insisted that "[o]ur position is that *Bountiful* is wrong" and "our decision to overrule [it] is neither gratuitous nor *obiter dictum*." 25 F.E.R.C. (CCH) ¶ 61,052 at 61,177 (Oct. 7, 1983).

The Commission announced that states and municipalities do not have a preference in any relicensing case involving the "original licensee."

The Commission asserted:

Today . . . we have come to the conclusion that *Bountiful* was wrong and should be overruled. We believe *Bountiful*'s conclusion was legally erroneous and that states and municipalities have a relicensing preference against all adversary non-preference applicants *other than* "original licensees" in possession

25 F.E.R.C. at 61,176 (emphasis added).

The Commission averred that in spite of the parties' participation in the *Bountiful* litigation, the Eleventh Circuit's decision, and the Supreme Court's denial of certiorari, there was "no legal impediment" to overruling *Bountiful*. *Id.* Addressing itself to the merits, the Commission dismissed the legislative determination that "a permitting and licensing preference for States and

municipalities was in the public interest" as "a conception of that era." *Id.* at 61,192. Accordingly, the Commission reversed the ALJ's award and gave the license to Pacific Power.

The Commission acknowledged that there were no significant differences between Pacific Power and Clark-Cowlitz's plans and that there was "no reason to question" Clark-Cowlitz's ability to finance the acquisition of the Merwin development or finance Merwin's continued operation and maintenance. It asserted, however, that broad "economic considerations" are within its scope of review in assessing the "public interest." These factors, it claimed, weighed in favor of allowing "the segments of the public" served by Pacific Power to retain the benefits of Merwin power. Therefore, even if *Bountiful* were not wrong, the Commission reasoned, the ALJ's award would have to be revoked because the two applicants were not equal. The Commission did not address the ALJ's conclusion that there would be a "wash" of costs and benefits to all consumers in the region.

The Commission further found that the portion of § 7(a) providing that

the Commission shall give preference to applications . . . by states and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission, be made equally well adapted

does not require any sort of post-hearing opportunity to cure deficiencies. Two Commissioners dissented from the portion of the opinion reversing *Bountiful*.

Clark-Cowlitz immediately sought a rehearing. As a result of FERC's abrupt decision to overrule *Bountiful*, numerous representatives of the power industry—both public and private—intervened. The public power or-

ganizations sided with Clark-Cowlitz and requested rehearing. The private power companies aligned themselves with the Commission's new position. The Commission denied rehearing in a two-page boilerplate order. This appeal ensued.

This court has jurisdiction under § 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b) (1982). The American Public Power Association, and a number of cities and public utility authorities, including the City of Bountiful itself, have intervened in support of Clark-Cowlitz. The Pacific Power & Light Company has intervened in support of FERC's new decision in its favor. Pacific Power is joined by several entities representing private utilities' interests, by an organization of paper manufacturers, and by the public utility authorities of Oregon and California. The Washington Departments of Fisheries and Game intervened for the limited purpose of addressing issues related to wildlife conservation.

DISCUSSION

I. *Res Judicata/Collateral Estoppel*

Initially, the controversy over the Commission's reversal of its own policy, after that policy had been upheld by a federal court of appeals and the Supreme Court had declined to review it, presents this court with a substantial question in the area of preclusion. Clark-Cowlitz claims that the Commission's abrupt about-face on the municipal preference issue constitutes an attempt to relitigate a decided question, in stark violation of the closely-related principles of *res judicata* and collateral estoppel. Clark-Cowlitz never specifies which of the two doctrines it considers violated, but refers instead in each instance to both. The other parties seem to share the petitioner's uncertainty. Confusion as to whether the problem involved is one of *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) is the un-

derstandable result of the unusual circumstances of this case and the ambiguities in the doctrines themselves.

The gist of petitioner's argument is that the legal question of whether the municipal preference applies to relicensing proceedings in which the original licensee is a party was exhaustively litigated and definitively resolved in *Bountiful*. Indeed, Clark-Cowlitz contends, the resolution of the meaning of the municipal preference was the sole purpose of the *Bountiful* proceeding. To permit relitigation of that issue now would be to render *Bountiful* a nullity and to imply that the Eleventh Circuit's opinion had been advisory and, hence, unconstitutional.

The Commission's rebuttal is not very persuasive. Its argument boils down to an assertion that application of preclusion here would "freeze the development" of the law and an admonition that the doctrine should not be applied "rigidly" and "woodenly." The Commission's ally, Intervenor Public Utility Commissioner of Oregon, is bolder: he declares outright—in underscored letters—that "*the Eleventh Circuit's decision affirming the Commission's Opinion 88 [Bountiful] was an unconstitutional advisory opinion issued in the absence of any actual controversy. The decision therefore had no legal effect.*" Brief of Intervenor Public Utility Commissioner of Oregon at 7 (emphasis in the original).

We reject the harsh allegations of unconstitutional conduct by the Eleventh Circuit. Wholly apart from the dubious propriety of a sister circuit construing a decision in such a fashion, and the Commission's implying misconduct by the Eleventh Circuit for upholding the Commission's decision, the facts do not bear out the charge. There was a definite case and a very lively controversy at the time the Eleventh Circuit acted on the *Bountiful* matter. The issue was handled as a declaratory matter because all parties recognized the issue as one which would arise in essentially identical form in several pend-

ing and a large number of impending cases. The City of Bountiful and others recognized that the viability of their hydropower applications turned upon the applicability of municipal preference. All agreed that in the interests of clarity, consistency, judicial economy, efficiency and the avoidance of needless expense, the question should be separated and resolved in one consolidated proceeding rather than separately litigated in each and every one of the cases in which it was certain to arise. The sole and entire purpose of the *Bountiful* proceeding was to resolve the municipal preference issue. The Commission, Clark-Cowlitz and Pacific Power, as well as numerous other intervenors, took part in the *Bountiful* proceeding and litigated energetically. After extensive briefing and a full day of oral argument, the Commission ruled unanimously that the municipal preference unambiguously applied to all relicensings, including those involving incumbent licensees. The private utilities immediately petitioned for review.

When presented with the case, the Eleventh Circuit recognized that the declaratory format raised a threshold question of case or controversy. *See Alabama Power*, 685 F.2d at 1314. Although *all* parties to the appeal urged the Eleventh Circuit to reach the merits, *id.*, the court recognized its obligation to explore the threshold jurisdictional question and refrain from acting if such action would violate Article III. Only after consideration and discussion did the court conclude that the dispute did present an actual case or controversy. *Id.* at 1315.

The court noted that the judiciary is "reluctant to apply declaratory judgments to administrative determinations 'unless these arise in the context of a controversy "ripe" for judicial resolution.'" *Id.* (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). After devoting several paragraphs to discussing the pertinent Supreme Court precedents, the court found that the issue presented was "purely legal," and that "the chal-

lenged agency action [would] have a direct and immediate impact on the petitioners, the states, and all potential applicants, as well as the workload of the Commission." *Id.* It further found that "the resolution of this issue now will foster effective enforcement and administration by the agency." *Id.* The Eleventh Circuit thus concluded that it had jurisdiction.

On the merits, the court found the Commission's interpretation reasonable; however, it did not uphold the Commission's interpretation because it was one reasonable interpretation among many. Rather, the court applied a much stricter standard of review to the agency decision and held that the other interpretation being urged was clearly wrong. The court stated categorically that the interpretation suggested by private power interests "changes the statute's entire preference structure," and would make the statutes application "confusing and sporadic." *Id.* at 1316. The court concluded that the proffered interpretation would effectively render the preference a nullity because the public sector would then be preferred *only* when a project was so unsuccessful that the incumbent had no desire to renew. *Id.* "Thus," the court continued, "states and municipalities realistically would have no preference at all because a preference to a losing project is worthless." *Id.* The private utilities requested rehearing en banc. The request was unanimously denied.

Thus, the Eleventh Circuit squarely addressed and squarely rejected the argument currently being made by the Commission. More important, as detailed in some length above, the Supreme Court was informed of the Commission's changed stance and of the Solicitor General's opinion that "under traditional *res judicata* principles, if this Court denies certiorari . . . , [the parties] may be bound by the Commission's order in any future relicensing proceeding," and responded by unanimously denying certiorari.

It was in the aftermath of the Eleventh Circuit's ruling that the ALJ held a hearing on the competing applications to operate Merwin and, applying the *Bountiful* precedent, concluded that the license should go to Clark-Cowlitz. Having failed to secure the Supreme Court's cooperation in its dramatic policy reversal, the Commission apparently decided to pursue another tack—one already hinted at in the transcript of FERC's closed meeting—a backdoor reversal in *Merwin*.

Thus, without formal notice to the affected parties, and without any briefing or argument, summary reversal of *Bountiful* was announced by the Commission as one of its reasons for reversing the ALJ's determination. Despite the substantial resources and energy invested by all parties in pursuing the *Bountiful* litigation, the Commission claims that it was in no way bound by the result of that litigation and could reverse the case and reject the statutory interpretation it embodied at will. Clark-Cowlitz contends rightly that at least as to the parties that actually participated in the *Bountiful* decision re-litigation is barred.

Res judicata and its fraternal twin collateral estoppel are venerable common law doctrines. They have been the subject of numerous cases and much commentary. There is a consensus that both doctrines are "firmly fixed in the firmament of federal jurisprudence." See *Faucett Associates, Inc. v. AT&T*, 744 F.2d 118, 125 (D.C. Cir. 1984), and cases cited therein. There is also consensus that they advance the same interests: protection of litigants from the vexation and expense of repetitious litigation, protection of the courts from the burden of unnecessary litigation, promotion of respect for the judicial process and confidence in the conclusiveness of judicial decision-making, avoidance of disconcertingly inconsistent results, and securing the peace and repose of society. See, e.g., *United States v. Mendoza*, 464 U.S. 154, 157-59 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980); *Parklane Hosiery*

Co. v. Shore, 439 U.S. 322, 326 (1979); *Faucett*, at 124; *Otherson v. Department of Justice*, 711 F.2d 267, 271, 273 (D.C. Cir. 1983); *Segal v. AT&T*, 606 F.2d 842, 846 (9th Cir. 1979). "The principle is simply that later courts should honor the first actual decision of a matter that has been actually litigated." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4416 at 136 (1981).

At the practical level of definition and application, however, agreement stops and confusion sets in. A survey of relevant informed opinion reveals little agreement as to how the doctrines should be defined, how they differ from each other, or how the two may be reliably differentiated in any but the most commonplace situations.

Res judicata is sometimes used as a generic term encompassing the whole field of preclusion with collateral estoppel a mere subset, *see, e.g.*, 4 K. Davis, *Administrative Law Treatise* §§ 21:1-21:9 (2d ed. 1983), sometimes to mean a more narrow, specific type of preclusion, and sometimes to refer to both, *see, e.g.*, *Allen v. McCurry*, 449 U.S. at 94 n.5 (with the narrower meaning distinguished as pure *res judicata*); *Kaspar Wire Works, Inc. v. Leco Engineering and Machine, Inc.*, 575 F.2d 530, 534-40 (5th Cir. 1978).

Under *res judicata*, the Supreme Court has said, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. at 94. Under collateral estoppel, by contrast, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* (emphasis added). *Res judicata*, it is commonly said, prevents a party "from relitigating the same cause of action against the parties to a prior decision." *Mendoza* at 163.

Collateral estoppel is typically said to "foreclose[] litigation only of those issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties, *whether on the same or a different claim.*" *Segal v. AT&T* at 845 (emphasis added, citations omitted).

In an effort to organize and simplify this body of law, the *Restatement (Second) of Judgments* introduced and urged the adoption of the terms "claim preclusion" and "issue preclusion." Unfortunately this did little to dispel the confusion because the two new terms are invariably defined in terms of the old. *See, e.g., Otherson*, 711 F.2d at 273. All the old problems are thus incorporated by reference into the new terms. Further "[t]he distinction between an issue and a claim is often one of degree and emphasis in applying a deeper principle that an original misadventure cannot be retrieved for a second chance." 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4402 at 10. The problem was never really one of difficult terminology but rather one of inadequately delineated concepts. What generally travels under the name of *res judicata* is a preclusion problem where the alignment of parties, facts, and allegations is exceedingly close; collateral estoppel is generally applied when the alignment is less tight—when the same legal issues arise in connection with a different subject matter or different parties.

Although if pressed, we would designate the present situation as one involving *res judicata*, we think the choice of label is of little import. Under any of the tests commonly applied under either rubric, the issue which the Commission seeks to relitigate is one which is and ought to be closed. The facts of this case, the procedure adopted by the Commission, and the flouting of a decision on a statutory interpretation question decided by a court of competent jurisdiction all make this case a model for the application of preclusion principles.

FERC has cited to us the Supreme Court's relatively recent collateral estoppel decisions *United States v. Mendoza*, 464 U.S. 154 (1984), and *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984). We find nothing in either of those decisions that supports the Commission's position. In *Mendoza*, the plaintiff sought to offensively estop the government with a district court decision that the government had failed to appeal. Noting the enormous volume of government litigation and the impossibility of the government's appealing every adverse judgment, the Court found that offensive collateral estoppel by a *non-party* should not be permitted against the government. The court noted, however, that "of course," the government "may not now undo the consequences of its decision not to appeal the District Court judgment in the [prior district court] case." As to the litigants involved in the prior case, "it is bound by that judgment under the principles of *res judicata*." *Mendoza*, 464 U.S. at 162. The *Mendoza* court effectively responded to the Commission's asserted fears that the development of the law will be frozen. The Court stated:

The concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present. . . . The application of an estoppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Government is still free to litigate that issue in the future with some other party. And where the parties are the same, estopping the Government spares a party that has already prevailed once from having to relitigate.

Mendoza, 464 U.S. at 163-64. Indeed, where the parties are the same, the Court was willing to allow estoppel of the government even as to separable causes of action. Thus, in *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984), Stauffer was permitted to use a judgment won against the government with respect to one

plant in litigation involving a second plant even though the two plants were located in different jurisdictions, and certain other factual details were different. The court found that estoppel was available to "preclude relitigation of the same issue already litigated against the same party in another case involving *virtually* identical facts." *Id.* at 169 (emphasis added). The court noted that "the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *Id.*

The Court, moreover, all but did away with the "unmixed questions of law" exception to the application of preclusion doctrine. The Court stated that "[a]dmittedly the purpose underlying the exception for 'unmixed questions of law' in successive actions on unrelated claims is far from clear" and was "frank to admit uncertainty as to its application." *Id.* at 172, 171. The Court explained that the test for the exception seems to be "whether an 'issue of fact' or an 'issue of law' is sought to be relitigated" and then whether "the 'issue of law' arises in a successive case that is *so unrelated* to the prior case that relitigation of the issue is warranted." *Stauffer Chemical Co.*, 464 U.S. at 171 (emphasis added). The Court went on to observe that

"[w]hen the claims in two separate actions between the same parties are the same or closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law.'"

Stauffer Chemical Co., 464 U.S. at 171 (quoting *Restatement (Second) of Judgment* § 28, Comment b (1982)).

We think it amply evident that every consideration of equity, judicial economy, and consistency militates in favor of a finding of preclusion here. The parties all devoted enormous resources to litigating the municipal preference question energetically in *Bountiful*. They would have been far less likely to do so if they thought that the decision there was one that could be changed by the Commission at whim. The Commission itself represented to the Eleventh Circuit that its conclusion was entirely independent of and could not possibly be influenced by the facts of any particular relicensing case. The Solicitor General, in presenting his brief on behalf of the Commission to the Supreme Court, indicated that he and the agency believed that a denial of certiorari would give the Eleventh Circuit's decision binding effect as to the present parties. All the parties to this suit were parties to *Bountiful*, little time has passed and no material change in circumstances has occurred. The facts are not merely "virtually" the same. They are identical. It was precisely the municipal preference issue presented here that Clark-Cowlitz and Pacific Power were interested in when they intervened in *Bountiful*. We think it amply evident that as to the parties to *Bountiful*, FERC was not entitled to relitigate the municipal preference question.

We find disturbing, moreover, the Commission's suggestion that it is free to reinterpret statutes in any way it pleases without regard for precedent, and equally disturbing the hint that the Commission does not think itself in anyway bound by the actions of prior Commissions, let alone court decisions affirming those actions. Although we traditionally give agencies considerable latitude, agencies must use their interpretative discretion with some measure of constancy and reason. See *American Trucking Associations, Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967). Accordingly, we find FERC's contentions without merit, and conclude that the

relitigation of this issue was barred by the doctrine of preclusion.

Our concurring colleague is correct in asserting that "saying that the Commission's new interpretation is unreasonable is different from saying that the Commission is precluded from asserting it." However, we continue to believe that the Commission is precluded from successfully asserting its new interpretation in this case with these parties. That the Eleventh Circuit *deferred* to the agency's statutory interpretation does not mean that the court did not also interpret the statute. The Eleventh Circuit specifically held, after an independent consideration of the statute and its legislative history, that the Commission's interpretation was correct. And we are required by the principles of *res judicata* to hold FERC bound by that interpretation.

II. *Municipal Preference*

Even were we to find merit in FERC's arguments with respect to preclusion, however, we would be constrained to reverse. FERC's present interpretation of § 7(a) of the Federal Power Act is unsupported by either the statute's language or its legislative history. Even giving FERC the deference normally accorded an agency's interpretation of its governing statute, the Commission's proffered reading would have to be rejected. In this case, moreover, deference is inappropriate because of FERC's startling departure from its clearly-established prior position based on purely internal discussions held at a closed meeting, without notice to any of the affected parties. Compare *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983); *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, No. 83-2111 (D.C. Cir. Oct. 22, 1985).

The relevant section of the statute—7(a)—provides

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 808 of this title* the Commission shall give preference to applications thereof by states and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted to conserve and utilize in the public interest the water resources of the region

16 U.S.C. § 800(a) (1982) (emphasis added).

Section 808(a) provides:

If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee . . . *the Commission is authorized to issue a new license to the original licensee . . . or to issue a new license*

16 U.S.C. § 808(a) (1982) (emphasis added).

FERC seeks to capitalize on the “plain” distinction between “new” licensees and “original” licensees allegedly drawn in the statute. FERC contends that the use of these words clearly and unambiguously establishes that municipal preference applies only when the licensees in question are “new” and *not* when they are “original.” We find FERC’s interpretation strained to say the least. At most, the ‘new/original’ distinction highlights an ambiguity in the statute. When we turn as, under the circumstances we must, to the legislative history, Congress’ intent is clear.

The Federal Power Act was the result of long years of intense controversy over the proper use and disposition of the nation’s water resources. The battle lines between conservationists and public power on the one hand and

private power interests on the other were clearly drawn in the early part of the century. The public power advocates saw the private interests as "power grabbers" who were "eager for plunder." *Chemehuevi Tribe v. FPC*, 489 F.2d 1207, 1218 n.55, 1214-25 (D.C. Cir. 1973) (quoting H.R. Rep. 1050, 62d Cong., 2d Sess. (1912)) (citations omitted). Many wanted the water power projects to be controlled exclusively by state and local governments or other public entities. Others, however, pointed out that few public entities had the financial resources to undertake water power development and that private parties could not be expected to commit substantial funds to projects that might be taken from them at will. The conservationists, led by Gifford Pinchot, battled long and hard against the private power industry. The industry, knowing how much was at stake, fought equally hard. In the words of the chief historian of the struggle, enormous funds were spent "to employ talented, persuasive, lobbying attorneys" and "[f]or ten years, tremendous pressure was brought to bear upon Congressmen by power companies." J. Kerwin, *Federal Water-Power Legislation* 8 (1926); see generally the extensive discussion in *Chemehuevi* at 1214-25. The struggle, moreover, was not confined to the substantive issues but became a major testing ground in the ongoing war between the advocates of states' rights and the advocates of centralized federal power.

The bill that eventually emerged from what Professor Kerwin has summed up as a "heated controversy" and a "prolonged and bitter" conflict (J. Kerwin at 7), was a compromise between the public interest in maintaining control of water power and the private interests in ensuring a reasonable return on investment.

In the words of O.C. Merrill, the man who drafted the bill and served as the Commission's first Executive Secretary, "the chief purpose" of the Federal Power Act was to "provide conditions under which capital can be secured

[to develop hydropower] while at the same time fully to protect the paramount interests of the public in its last great national resource." O.C. Merrill, *Benefits Accruing to Municipalities Through the Federal Water Power Act*, The American City, Vol. XXIII, No. 5 (Nov. 1920), reprinted in J.A. at 272. To reassure private investors, Congress authorized long-term licenses (up to 50 years) and provided that if the federal government or any other private entity took over after the expiration of a license, the original licensee would be compensated in an amount equal to its net investment plus severance damages. The evidence is clear that, at the time, both Congress and the private utility industry considered these two provisions adequate to safeguard the legitimate interests of private power. For example, John A. Britton, then Vice President and General Manager of the Pacific Gas & Electric Company of California, testified before the Senate Committee on Public Lands as follows:

The CHAIRMAN. Now there will be a number of these—after the period begins to expire there will be a number of them every year; that is, if this bill passes, so many in 1970, so many in 1990—at the end of 50 years there will be a number of these contracts terminating every year; and I think it will be practically impossible to have an appropriation bill or a bill passed through Congress appropriating money to pay for these plants

Mr. BRITTON. I am quite in agreement with you on that, but I think that at that time, 50 years from now, we will find that the Government itself will be very glad to take it over for the purpose of turning it over to a municipality, . . . at the end of the 50 years the Government of the United States will elect to give that to the municipality. If it don't, it can permit Mr. [Henry J.] Pierce [President of Washington Irrigation & Development Company] to continue it or it has the right to give it to someone else The Government don't have to take it

over . . . but *I do believe that most of these plants erected under these licenses, where they are applicable to a growing community, will be taken over by municipalities and operated by them, and not by the lessees.*

. . .

The CHAIRMAN. But if the Government has to take it over it has got to pay him all it is worth.

Mr. BRITTON. Yes, sir.

The CHAIRMAN. Then that makes his bond good.

Mr. BRITTON. Certainly; there is no objection to that at all. The point is that *these projects can be financed on a 50-year basis*, and they are willing to accept at the end of 50 years, if the Government does not want to give it to them again, the value of the property. That makes the bond good

See Hearings on H.R. 8716 before the House Committee on Water Power, 65th Cong., 2d Sess. 239-41 (1918) (emphasis added). The *additional* safeguard, which both FERC and the private utilities now desire—the safeguard of protecting the incumbent licensee from application of the municipal preference against it—was suggested but never adopted. Indeed, there was an unwillingness to even allow incumbents a preference as against competing *nonmunicipal* applicants. A proviso containing such a limited preference for incumbents was specifically deleted upon the insistence of the administration of President Woodrow Wilson.

In its original form the bill merely provided that:

In issuing licenses hereunder, the commission may in its discretion give preference to applications by States and municipalities

H.R. 8716, 65th Cong., 2d Sess. § 7 (1918). It did not distinguish between licensings and relicensings. Even in this vague original form, however, there was a general consensus that relicensings were as subject to the mu-

municipal preference as were original licensings. Although the bill went through a number of permutations, no one seemed to think that the changes effected any diminution in the scope of the municipal preference. On the contrary, the bill's drafter and the House Manager asserted that the bill gave municipalities a preference "both in the case of new developments [initial licenses] and in the case of acquiring properties of another licensee at the end of a license period." 59 Cong. Rec. 6527; cf. *Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337 at 61,712-736 (June 27, 1980).

Some of the legislators voiced their legislative aims quite strongly:

Mr. WALSH. [T]here is no doubt in the world about the advisability of having these water powers owned and controlled, developed, and operated by the municipalities or by the States, if that is a practical proposition.

. . .

Mr. WALSH. If a private party and a municipality both are asking for a permit, the permit must be given to the municipality under the provisions of the bill.

Mr. BORAH. Is that mandatory?

Mr. WALSH. It is mandatory, as I understand from a reading of the bill. But if it is not I will agree with the Senator that it shall be made so.

Mr. BORAH. That is precisely what I want.

56 Cong. Rec. 10483-84 (1918).

The representatives of the private utilities also repeatedly indicated that they understood the bill to mandate municipal preference in *all* relicensing proceedings. See, e.g., Hearings on H.R. 8716 at 238-41 (Statement of John Britton, Vice President of PG&E). For example, the following exchange took place between a private power witness—E.K. Hall, Vice President of the Electric Bond

and Share Company of New York—and a member of the House Special Committee.

Mr. CANDLER. Now then you do understand that under this bill the Government of course has the first right to retake the property?

Mr. HALL. Yes, sir.

Mr. CANDLER. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?

Mr. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

Mr. CANDLER. Then the original licensee would have only the third opportunity to count on his lease.

Mr. HALL. That is the way I understand it.

Hearings on H.R. 8716 at 200.

In June 1919, Gifford Pinchot, the leading conservationist and advocate of public control, wrote the Chairman of the Senate Committee, suggesting changes:

The obvious intention of Sec[*tion*] 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof", or words of like import.

Letter of June 25, 1919 from Gifford Pinchot to Senator Wesley Jones at 7, *reprinted in J.A.* at 213. Pinchot's suggestion was adopted.

In April 1920, O.C. Merrill prepared a special memorandum on the bill for the House Manager of the Conference Committee, Representative Lee. It stated, *inter alia*, that:

In the development of water powers by agencies other than the United States, the bill gives prefer-

ence to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.

Memorandum on Features of Public Interest in Water Power Bill H.R. 3184, Apr. 27, 1920, at 3, *reprinted in* J.A. at 254, 256. After the bill had been passed by both Houses and awaited only the President's signature, O.C. Merrill wrote in response to presidential inquiries:

For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of the license period.

O.C. Merrill, Memorandum [for President Wilson] on Water Power Bill H.R. 3184, June 9, 1920, at 2, *reprinted in* J.A. at 261, 262. The President signed the bill shortly thereafter.

In keeping with this history, both the earliest Commission and the courts in the 1920's when first called upon to hear cases relating to the act, interpreted the municipal preference as applicable across the board without reference to the identity of the incumbent licensee.

In response to the great mass of evidence supporting Clark-Cowlitz's interpretation, FERC can point only to one isolated comment by Congressman Sims, which, when stretched and taken out of the context of the rest of the dialogue, arguably supports its interpretation. Taken in context, as FERC itself explained to the Eleventh Circuit before it changed its mind, Sims statement is simply not on point.

In short, the statute on its face may be somewhat unclear; but the legislative history removes any shadow of doubt as to what Congress wanted to happen when relicensing time arrived. The municipal preference applies to all relicensing including those involving an incumbent licensee.

III. *The Economic Impacts Analysis*

As a purportedly independent and alternative basis of its decision, FERC argues that Clark-Cowlitz was not entitled to the license because the ALJ erred in determining that the two applicants were "equally well adapted." According to the Commission, Pacific Power should, in fact, be viewed as superior because of "broad economic considerations." These economic considerations consist of the relative costs to the current customers of each applicant if that applicant fails to obtain the license. What has been said above and in our companion case raises serious questions as to whether the determined, covert, and almost deceitful attack on the *Bountiful* policy may have so tainted the Commission's decision in this case as to render it a nullity. However, even if we indulge the Commission with every presumption of regularity of procedure, we find the merits of this holding fatally flawed.

We agree with Clark-Cowlitz that the Commission's position, if adopted, would render the statutorily-mandated Municipal preference a nullity. We cannot believe that Congress would have enacted a specific statutory preference with one hand and with the other given the Commission the power to disregard it at will. Indeed, we find numerous indications in the legislative history, such as the Borah-Walsh exchange quoted above, which indicate that Congress did not want the Commission to have discretion to meddle with or entirely undo the preference. We find especially specious the Commission's suggestion that because Clark-Cowlitz is eligible for federally-subsidized BPA rates, while a substantial percentage of Pacific Power's customers are not, that Clark-Cowlitz should not be permitted to take advantage of another federally-enacted benefit. By this reasoning, Congress' very consistency in preferring public entities becomes a justification for transferring benefits to private power. Such review of the wisdom or fairness of Congressional choices is beyond the limits of the Commission's power.

The Commission focuses on the statute's use of the phrase "public interest" as proof that Congress intended that the agency should have free rein to apply a "benefits" test of its own devising. As the Supreme Court has said, however, "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purpose of the regulatory legislation." *NAACP v. FPC*, 425 U.S. 662, 669 (1976). It is clear from the statute that Congress never intended to authorize the standardless whatever-you-think-best analysis that the agency asserts is appropriate.

Section 7(a) states:

The Commission shall give preference to applications therefore by states and municipalities, provided the *plans* for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, *to conserve and utilize in the public interest the water resources of the region*; and as between other applicants, the Commission may give preference to the applicant the *plans* of which it finds and determines are best adapted *to develop, conserve, and utilize in the public interest the water resources of the region*, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. § 800(a) (1982) (emphasis added).

We think it is clear under the Commission's precedents that the judgment the Commission is authorized to exercise under § 7(a) is a 'technical' judgment about the soundness and feasibility of plans. "[T]echnical" questions are "precisely that which the Commission exists to determine." *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 171 (1953); see also *National Hells Canyon Association v. FPC*, 237 F.2d 777, 779-80 (D.C. Cir. 1956). The Commission's decisions have sometimes referred to "economic impacts" but the phrase has referred

to economic feasibility, not to wide-ranging policy considerations as to the best allocation of profits and losses—in short, of wealth in this country.

The Commission's conclusion that economic losses to Pacific Power's customers are sufficient in and of themselves to declare applicants unequal and the preference inapplicable is particularly disturbing in light of the fact that it is self-evident that any change of license will involve at least temporary economic disruption and some shifting of benefits from the former licensee to its successor. To use that very shift as grounds for refusing to displace an existing licensee is to create an almost insurmountable preference in favor of the incumbent. The legislative history makes it abundantly clear that the length of the term and payment for property taken were the only entitlements given an incumbent licensee. Any other result would be anomalous in light of the fact that preventing private corporations from acquiring a permanent hold on water power resources was perhaps the single most important goal of the statute's drafters. The desire to prevent private power from acquiring permanent rights over the nation's waterways was, for example, *the* reason why a system of definite-term licenses was adopted. We think it is amply evident that Congress had no intention of giving FERC unbridled discretion to undo the preference system that Congress had so painstakingly established. To the extent that Congress granted FERC discretion, that discretion was limited to technical matters within the agency's expertise and did not extend to rendering legislative policy judgments about the national economy and the general welfare. Consequently, we find the interpretation given the words "public interest" by FERC untenable.

Our differences with our concurring colleague on this point may not be as great as they appear. We do not hold that the Commission is barred *entirely* from considering any economic losses to Pacific Power's customers.

Such considerations, for example, might be appropriate in structuring the transfer of a license or in a case where the criteria for choosing between competing applicants had not been so clearly spelled out by Congress as they were here. In this case, however, where Congress has, so to speak, occupied the field, the commission went beyond its statutory authority.

Even if FERC's position were acceptable, however, its application of its "economic impacts" analysis to the present case would have to be reversed as arbitrary and capricious. The ALJ took substantial evidence on the potential economic impact and concluded that, in the long run, the ultimate effect of the costs and benefits was a "wash":

The relicensing of Merwin does not change the total requirements for or supplies of power in the Pacific Northwest, now or in the future, nor does it change the cost of such supplies. As PP&L's [Pacific Power] policy witness stated, Merwin, in effect, constitutes a power supply for all systems in the Pacific Northwest, and power generated at Merwin is available to any consumer in the region. The low cost BPA preference rate power to be released by JOA [Clark-Cowlitz] if it acquires Merwin will, in turn, provide savings to other purchasers from BPA by displacing their higher cost power. Part of such savings may return to PP&L through the N[ew] R[esources] rate. This "ripple" or displacement effect will tend to produce a "wash" of costs and benefits in the Pacific Northwest. If a final balance of cost burdens and benefits is not achieved within the Pacific Northwest as defined in the Regional Act, the displacement effect will spill over outside the region. Through PP&L or BPA, Merwin is interconnected via the Western Interconnected Systems with all major utility systems of the Rocky Mountains. The net result of successive displacement of higher power costs would be to produce total dollar savings on the systems of the JOA members and those other

systems benefitting from the released BPA preference power which would match the increased costs on the PP&L system. Taking the comparison of cost burdens and benefits to the ultimate impacts beyond the systems of PP&L and the JOA members conforms to a broad consideration of the full range of interests which would be affected by granting the license to JOA.

23 F.E.R.C. (CCH) ¶ 63,037 at 65,110 (April 28, 1983) (citations omitted). The ALJ observed, it seems to us correctly, that "the 'public' whose interest the Commission should consider in its evaluation . . . encompasses, at the very least, the full range of interests directly affected by its order." *Id.*

The Commission ignored this analysis and predicated its new and different decision on the likely economic impact on certain "segments" of the public. The Commission provides no explanation as to why it focuses on "segments" rather than on consumers as a whole. Further, the Commission places considerable emphasis on the likelihood that the increase in costs to Pacific Power customers *as a group* would be greater than the savings effected by Clark-Cowlitz customers *as a group* but fails to note that since the two customer groups are of different size the increased costs likely to be sustained by individual Pacific Power customers were small compared to the savings likely to be effected by individual Clark-Cowlitz customers. As applied, the economic impacts analysis is entirely arbitrary and in conflict with the statute's underlying policies.

CONCLUSION

This case, ostensibly, is a dispute between two applicants for a hydropower project in the state of Washington. However, the stakes are and have been substantially greater than the identity of the successful applicant for the Merwin project. At stake is the vitality

of a Congressional decision favoring municipalities in the operation of hydroelectric power plants. That municipal preference question, at the core of this controversy, was extensively litigated and definitively resolved as to these parties in the *Bountiful* proceeding. At issue here, therefore, is the constancy, not only of an agency's decisional process but of the federal reviewing courts as well. To uphold the Commission's decision in this case would declare the doctrine of preclusion totally inapplicable to this agency. Even aside from that, we think it amply evident that the statutory interpretation argued for by petitioner Clark-Cowlitz is correct. Finally, we find that the Commission's attempt to import broad-ranging national policy considerations into the phrase "public interest" under the rubric of "economic considerations" exceeds its authority and is impermissible.

Congress labored long and often to establish a public power policy for this country. The monumental political battles which took place over this issue reflected the wiliness and determination of powerful adversaries with strongly held views. Every aspect of the statute that finally emerged was repeatedly and hotly contested. It is not for FERC to rewrite that history or the resulting statute. Nor can points lost in the legislature and then in the courts be won in the same courts by the simple expedient of repetitious litigation. The Commission erred in overturning the ALJ's initial decision, and its award of the license to petitioner Clark-Cowlitz. Accordingly, we reverse and remand to the agency with directions to reinstate the initial award in favor of Clark-Cowlitz.

It is so ordered.

WRIGHT, *Circuit Judge, concurring in part*: I am substantially in agreement with the majority opinion, especially with respect to the principal issue, the construction of the municipal preference. I write separately, however, to make clear my analysis of the case.

Judge Mikva's discussion of *res judicata* and collateral estoppel is a lucid and scholarly exposition of a confusing and difficult area of law. However, I find myself unable to accept the predicate for its application to this case—that the Eleventh Circuit “did not uphold the Commission’s interpretation because it was one reasonable interpretation among many. Rather, the court applied a much stricter standard of review to the agency decision and held that the other interpretation being urged was clearly wrong.” Majority opinion at 14.

As I understand the *Bountiful* litigation, the Commission had interpreted the municipal preference statute, and the private license holders were challenging that interpretation. The Eleventh Circuit applied a deferential standard of review, noting that it should uphold the agency’s construction “unless there [were] compelling reasons indicating such construction is wrong.” *Alabama Power Co. v. FERC*, 685 F.2d 1311, 1316 (11th Cir. 1982) (citing *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1982)); see also *id.* at 1318, citing *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1982). The court found that FERC’s initial interpretation was reasonable. Therefore, any challenge to the reasonableness of that interpretation by the parties to *Bountiful* would certainly be precluded. But Clark-Cowlitz is not challenging the reasonableness of that initial interpretation, it is challenging the Commission’s revised interpretation. It may be difficult to imagine how two directly opposite interpretations can both be reasonable, but saying that the Commission’s new interpretation is unreasonable is different from saying that the Commission is precluded from asserting it.

The posture of this case is admittedly somewhat unusual. Intervention by virtually all the affected parties has converted a proceeding that is adjudicatory in form into one that is effectively a notice and comment rule-making. We should be extremely reluctant to apply collateral estoppel to this hybrid procedure in a way that enables an agency to bind the policy decisions of future generations.

In any event, my differences with the majority on the question of preclusion only make it that much easier for me to reach the merits of the municipal preference issue, and on this point I am in unqualified agreement with the majority opinion. There is no doubt that Congress intended the preference to apply on relicensing and that the Commission's revised interpretation of the statute is not a reasonable one.

With respect to "economic impacts," I would allow the Commission greater latitude than does the majority. I think the "public interest" easily comprehends consumer cost inequities. Nor do I believe this analysis *necessarily* undercuts the municipal preference, which when properly applied is merely a tiebreaker. I share the majority's concern about the potential for abuse, but that only means that we must be especially careful to scrutinize the Commission's application of the test, not that we hold it impermissible as a matter of law.

In this case, for example, the Commission's decision was so incompletely reasoned and explained as to be arbitrary and capricious. In particular, the Commission did not justify its failure to examine the economic impact on the entire region, as the Administrative Law Judge had done, rather than merely the customers of the competing applicants. I do not conclude that the Commission must adopt the ALJ's approach, but at least it must present some evidence that it considered this seemingly plausible alternative and rejected it for legitimate reasons. I would remand the case for that consideration.

[161,290]

Pacific Power & Light Company, Project Nos. 935-005-935-012;

Clark-Cowlitz Joint Operating Agency, Project Nos. 2791-004-2791-011

Order Granting Interventions and Denying Rehearing

(Issued November 22, 1983)

**Before Commissioners: Raymond J.O'Connor, Chairman;
Georgiana Sheldon, J. David Hughes and
Oliver G. Richard III.**

On November 4, 1983, Clark-Cowlitz Joint Operating Agency filed an application pursuant to Section 313(a) of the Federal Power Act and Rule 713 of the Commission's Rules of Practice and Procedure for rehearing of the Commission's Opinion No. 191 entitled "Opinion and Order Overruling Opinion No.88, Reversing Initial Decision and Issuing New License to Original Licensee," issued October 6, 1983 [25 FERC 161,052]. On the same day, four petitions to intervene out of time were filed¹ together with two other applications for rehearing of opinion no. 191.² and, on november 8, 1983, the Edison Electric Institute, a national association of investor owned electric companies, also filed petition to intervene out of time.

¹ By (1) the American Public Power Association (APPA), a national service organization composed of more than 1,750 municipal and state owned electric utilities in 49 states; (2) the City of Santa Clara, California, and the City of Bountiful, Utah; (3) the Tuolumne Regional Water District; and (4) the Sacramento Municipal Utility District, Northern California Power Agency and the cities of Anaheim, Azusa, Banning, Colton and Riverside, California (collectively, SMUD-Cal Cities).

² Jointly, by (1) APPA and SMUD-Cal Cities, and (2) the City of Santa Clara, California, and the City of Bountiful, Utah.

The Commission finds:

Good cause exists for waiver of the time limitation for intervention herein, which is in the public interest, and will not disrupt the proceeding, or prejudice or place additional burdens on the existing parties.

The Commission orders:

(A) All of the aforesaid applicants are hereby permitted to intervene in this proceeding subject to the rules and regulations of the Commission, Provided, that their participation shall be limited to matters affecting the asserted rights and interest specifically set forth in their respective application for intervention; and Provided further, that they accept the record in this proceeding as it was developed prior to their intervention. The Commission does not construe the allowance of the interventions as a recognition that any of the intervenors might be aggrieved by any orders in this proceeding.

(B) Rehearing of the Commission's Opinion No. 191 is hereby denied.

HYDRO-ELECTRIC PROJECT
Relicensing
Municipal Preference
Public Interest
FEDERAL POWER ACT
Section 7(a)
Section 10(a)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon, J. David
Hughes,
A. G. Sousa and Oliver G. Richard
III.

Pacific Power & Light Company) Project No. 935-000, 002,
) 003 and 004
)
Clark-Cowlitz Joint Operating Agency) Project No. 2791-000

OPINION NO. 191

OPINION AND ORDER OVERRULING OPINION NO. 88,
REVERSING INITIAL DECISION AND ISSUING
NEW LICENSE TO ORIGINAL LICENSEE

(Issued October 6, 1983)

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INTRODUCTION

In 1929, the Federal Power Commission issued a 50-year license under the Federal Water Power Act (FWPA) to a predecessor of Pacific Power & Light Company (PP&L), to construct, operate and maintain a hydro-electric development on the Lewis River along the common boundary between Clark and Cowlitz counties in southwestern Washington. The development was built and placed into operation, and is known today as the Merwin Project. In 1976, before the license expired, PP&L applied under

the Federal Power Act (FPA)¹ for a new license to continue to operate and maintain the development. In 1977, Clark-Cowlitz Joint Operating Agency (JOA)², a "municipality" within the purview of Section 3(7) of the FPA³, filed a competing application for a new license to acquire and continue to operate and maintain the development, claiming a licensing preference under Section 7(a) of the FPA.⁴

¹ The Federal Water Power was amended in 1935 to change its name to the Federal Power Act, modify certain existing provisions substantively and designate them as Part I, and enact Parts II and III. It is customary to distinguish between the pre- and post-amendment statute by its pre- and post-amendment names in the context that the FPA, as a new statute, superseded the FWPA.

Although the license expired in 1979, PP&L is continuing to operate and maintain the development under annual licenses issued pursuant to Section 15(a) of the FPA.

² JOA is composed of Public Utility District No. 1 of Clark County, Washington (Clark PUD), and Public Utility District No. 1 of Cowlitz County, Washington (Cowlitz PUD), and was established in 1976 to compete for, acquire, and operate and maintain, the Merwin Project.

³ The term "municipality" is defined in Section 3(7) to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power".

⁴ Section 7(a) reads,

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability

The Commission⁵ consolidated the applications for joint disposition. On April 28, 1983, after a hearing, an administrative law judge issued an Initial Decision finding:

1. At 40, that the economic impacts of choosing between PP&L and JOA are not "applicable, relevant, and material to a determination of the broad public interest in this proceeding", and

2. At 3, that "the plans of JOA are equally well adapted as those of PP&L to conserve and utilize in the public interest the water resources of the region."

On the basis of the latter finding, the Initial Decision concluded that JOA was entitled to a preference under the Commission's declaratory *City of Bountiful* decision (*Bountiful*)⁶, and broke the tie by awarding the new license to JOA.

In affirming *Bountiful*, the Eleventh Circuit commented that much of the material on which the Commission relied was "weak". In that light, the Court gave "great deference to the Commission's statutory interpretation":

of the applicant to carry out such plans.

Section 7(a) contains two preferences. The first preference, to States and municipalities, is commonly called the "municipal preference", and should be distinguished from the second preference "between other applicants."

⁵ The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

⁶ *City of Bountiful, Utah, et al.*, Docket No. EL78-43, Opinion No. 88 issued June 27, 1980, 11 FERC ¶61,337; *reh. den.*, Opinion No. 88-A issued August 21, 1980, 12 FERC ¶61,179; *aff'd. sub nom Alabama Power Company, et al. v. Federal Energy Regulatory Commission*, 685 F.2d 1311 (11th Cir. 1982); *cert. den.* (Nos. 82-1321, *et al.*) July 6, 1983.

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Today, in the perspective of this adversary relicensing proceeding, we have come to the conclusion that *Bountiful* was wrong and should be overruled. We believe that *Bountiful's* conclusion was legally erroneous and that States and municipalities have a relicensing preference against all adversary non-preference applicants other than "original licensees" in possession of project works.⁷ In other words, in relicensings, the municipal preference is limited to those situations in which States or municipalities, and non-preference applicants other than "original licensees" in possession of project works, ask for new mutually exclusive licenses for a hydro-electric development that is presently licensed to the "original licensee". And we also believe that *Bountiful* erred in a practicable sense in failing to address the relationship between Sections 7(a) and 10(a)⁸ within the scheme of the FPA.

⁷ Section 4(e) of the FPA authorizes the issuance of licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality. . . ." In the combined contexts of Sections 4(e) and 7(a), as the latter is interpreted herein, citizens, associations of citizens and corporations that apply for licenses become "non-preference applicants" other than "original licensees" in possession of project works.

⁸ Section 10 reads in pertinent part,

All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of

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As set forth in Section 10(a), the Commission's *primary* responsibility under Part I of the FPA has always been to license projects that, in the judgment of the Commission, will be best adapted to a comprehensive plan for beneficial public uses of waterways. Section 10(a) has been interpreted consistently by the Commission, and the courts, as requiring that judgment to be exercised in accordance with a *public interest* standard.⁹ Since evidence of eco-

interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreation purposes; and if necessary in order to secure such a plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

* * *

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

For convenience, the Section 10(a) mandate is sometimes expressed herein as the "project that is best adapted to a comprehensive plan for beneficial public uses", and the "comprehensive plan" or similar expressions extracted from Section 10(a).

⁹ For example: In *Calaveras County Water District*, Project No. 2903, 22 FERC ¶61,257, issued March 3, 1983, the Commission said, "Under Section 10(a) of the Federal Power Act, the Commission is obligated to determine whether the District's project is in the public interest."

In *Idaho Power Company*, Project No. 2930, 21 FERC ¶61,181, issued November 26, 1982, the Commission said, "Our obligation under Section 10(a) of the Federal Power Act is to consider all issues relevant to the public interest. . . ."

In *Kings River Conservation District*, Project No. 2890, 18 FERC ¶61,264, issued March 22, 1982, the Commission said, "[W]e believe that justifying the need for a hydroelectric project on the basis of cost savings from oil displacement is a legitimate objective in the public interest within the meaning of Section 10(a) of the Federal Power Act."

In *Public Utility District No. 1 of Snohomish County and City of Everett, Washington*, Project No. 2157, 17 FERC ¶61,056, issued October 16, 1981, the Commission said, "In approving the Licensees'

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nomical impacts is competent, material and relevant under Section 10(a) to a licensing action, *infra*, and since *Bountiful* failed to address the relationship between Sections 7(a) and 10(a), the Initial Decision erred in holding that evidence of economic impacts is not "applicable, relevant, and material to a determination of the broad public interest in this proceeding", including Section 10(a), as well as Section 7(a).

Accordingly, we are overruling *Bountiful*, and, for reasons to be addressed, we are also reversing the Initial Decision and issuing a new license to the original licensee, PP&L.

application the Commission must determine that the proposal meets the public interest standard of Section 10(a) of the Federal Power Act."

In *Georgia Power Company*, Project No. 2336, 10 FERC ¶62,164, issued February 26, 1980, the Commission said, "It would be contrary to the public interest and the obligation to ensure that the project continues to meet the standard of Section 10(a) of the Federal Power Act to approve prospectively such an unknown and indefinite lease of project lands."

These statements go back at least as far as *Southern California Edison Company*, Project No. 1930, 8 FPC 364, issued November 17, 1949, wherein the Commission said, at 386, "Our responsibility under section 10(a) is to protect the public interest. . . In granting this license under the authority of Congress we are required, as its agent, to control the use of the navigable waters. It is only by such control that we may assure adaption of the project to all public purposes. . . ."

In *Namekagon Hydro Company v. Federal Power Commission*, 216 F.2d 509 (7th Cir., 1954), the Seventh Circuit upheld the denial of a license on the ground that the unique recreational value of a waterway outweighed its power value, stating at 512,

Under Sect. 10(a) of the Act it was the Commission's responsibility to protect the public interest. The Act requires that the Commission exercises its judgment.

See note 30, at 33-34, for additional cases.

BOUNTIFUL IS OVERRULED

The Relative Bountiful and Merwin Perspectives

The *Bountiful* Commission described the limited scope of its declaratory inquiry (Op. 88, at 10), as follows:

[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

The Commission added (Op. 88, at 10) that it was not deciding any factual issues under Section 7(a) pertaining to specific projects, nor whether any particular applicants were "entitled" to the municipal preference, if it was applicable.

Today, in *Merwin*, we are required to decide the kinds of issues that the *Bountiful* Commission sought to avoid in framing that proceeding and decision. A municipality and a non-preference applicant are asking for new mutually exclusive licenses for a hydro-electric development that is presently licensed to the non-preference applicant. We have a factual record, and must decide factual issues under Section 7(a) and other provisions of the FPA. In deciding an applicant's *entitlement* to a preference (as distinguished from the applicability of the municipal preference to a class of applications, as in *Bountiful*), we must also decide public interest issues within the limits delegated by Congress in 1920, as later amended. And we must select a licensee.

In this changed perspective, we have concluded that *Bountiful* erred legally and should be overruled.

It could be argued that this part of the decision overruling *Bountiful* is gratuitous and *obiter dictum* because the Commission has found unanimously that the new Merwin license should be issued to PP&L. In other words, it does not matter whether the municipal or second preference provision of Section 7(a) is applied because the Commission is in full agreement that the plans of PP&L are better adapted than those of JOA and, consequently, that there is not tie.

We could not agree with such an argument. Our position is that the *Bountiful* decision was wrong, that the second preference provision is the applicable one when the original licensee in possession of the project works is one of the adversary applicants, and that we should overrule *Bountiful* so that the correct preference provisions will be applied in future relicensing proceedings. Applications raising eight adversary relicensing situations are now pending.

Furthermore, JOA supports the proposition in the Initial Decision, at 38, that the new Merwin license cannot be issued to PP&L without first giving JOA an opportunity to cure any deficiencies in its plans "found by the Commission". We do not reach that question in view of our position that the second preference provision is the applicable one, and the fact that the language on which the Initial Decision and JOA rely is contained in the municipal preference provision. If we are wrong, however, as to the second preference provision, and the municipal preference provision is determined to be the applicable one, our alternative position, *infra*, at 36-38, is (1) that the opportunity to cure deficiencies is not one to cure deficiencies "found by the Commission" after a hearing, (2) that JOA has had the opportunity to cure deficiencies that is provided by the municipal preference provision, and (3) that it would be absurd to provide an opportunity to cure incurable deficiencies, such as the economic implications of allocating the benefits of particular water resources to the customers of one applicant or the other. Our alternative

position necessarily is also the position of our colleagues, Commissioners Sheldon (who was a member of the *Bountiful* Commission) and Hughes, who stand by the *Bountiful* decision in issuing the new Merwin license to PP&L without giving JOA the opportunity that it claims.

The rationale of our alternative position necessitates an understanding not only of the legislative amendments that brought the controversial language into Section 7(a), but also both preference provisions of Section 7(a). In the light of that understanding, our decision to overrule *Bountiful* in the course of issuing the new Merwin license to PP&L without giving JOA the opportunity that it claims, is neither gratuitous nor *obiter dictum*.

The Commission Can Overrule Bountiful

In the light of the following court decisions, we have also concluded that there is no legal impediment to the Commission's overruling its erroneous *Bountiful* decision.

In *Chisholm, et al. v. Federal Communications Commission*, 538 F.2d 349 (D.C. Cir. 1976), *cert. den. sub nom. Democratic National Committee v. Federal Communications Commission*, 429 U.S. 890 (1976), the District of Columbia Circuit upheld a declaratory opinion and order of the Federal Communications Commission that overruled a statutory interpretation of over ten years' duration, stating, at 364,

[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding. *See, e.g., Automobile Club v. Commissioner of Internal Revenue*, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957). *See also American Trucking v. AT&S F.R. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847,

860 (1967); *NLRB v. A.P.W. Product Co.*, 316 F.2d 899 (2d Cir. 1963).

It is, of course, incumbent upon an agency reversing its own policy to provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S. App.D.C. 175, 454 F.2d 1018, 1026 (1971).

In *Phillips Petroleum Company v. Federal Power Commission*, 556 F.2d 466 (10th Cir., 1977), the Tenth Circuit affirmed a Commission decision overruling a prior decision, stating, at 470, that the Commission acted properly and "was not bound by its earlier error."

In *Alabama Power Company v. Federal Energy Regulatory Commission*, *supra*, the Eleventh Circuit was not impressed with the materials on which the Commission relied in *Bountiful*, and, in that light, gave "great deference to the Commission's statutory interpretation." it is possible, therefore, that the Eleventh Circuit was misled inadvertently by the Commission's *Bountiful* decision, which we now realize was erroneous. With respect to the denial of the petitions for a writ of certiorari to the Eleventh Circuit, justice Frankfurter said in *Maryland v. Baltimore Radio Show, Inc., et al.*, 338 U.S. 912 (1950), at 919,

Inasmuch . . . as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's view on the merits of a case which it has declined to review. The Court

has said this again and again; again and again the admonition has to be repeated. [10]

In other words, the Supreme Court has not ruled on the merits of the Eleventh Circuit's affirmance of the Commission's erroneous *Bountiful* decision.

And, in *Sprague v. Woll*, 122 F.2d 128 (7th Cir., 1941), cert. den. 314 U.S. 669 (1941), the Seventh Circuit affirmed a District Court holding that the Interstate Commerce "Commission, if it concluded that its original determination [in reliance upon a Supreme Court decision on the same question] was erroneous, had the power to correct its error." The Seventh Circuit said, at 131, that the decision of the Supreme Court did not bind the Interstate Commerce Commission as to subsequent determinations.¹¹

¹⁰ See, also *Supreme Court Practice*, Fifth Edition, by Stern and Gressman, at 353-360, and the cases cited therein.

¹¹ Chronologically, the Interstate Commerce Commission (ICC) determined that the Chicago North Shore & Milwaukee Railroad Co. (North Shore) was a "street, suburban, or interurban electric railway which is not operated as part of a general steam railroad system of transportation" within the purview of Section 20a of the Interstate Commerce Act and, therefore, that the North Shore was exempted by that provision from obtaining the ICC's authorization for the issuance of securities. Ultimately, the ICC's determination of the North Shore's status was upheld by the Supreme Court in *United States v. Chicago North Shore & Milwaukee Railroad Co.*, 288 U.S. 1 (1933). In 1936, the ICC determined that the North Shore was a "street, interurban, or suburban electric electric railway . . . operating as a part of a general steam-railroad system of transportation" within the purview of the Railway Labor Act and, therefore, that the North Shore was not subject to that Act. In so concluding, the ICC was influenced by the Supreme Court's 1933 decision and the fact that the claimed exemption was unopposed. Thereafter, the ICC was requested to determine the North Shore's status under the Railroad Retirement Act and the Carriers Taxing Act. In 1938, the ICC, on its own motion, reopened its determination under the Railway Labor Act, received additional evidence, and found that the North Shore was not a street, interurban, or electric

While the Statutory interpretation that was overruled in *Chisholm* was of over ten years' duration, the declaratory *Bountiful* interpretation is relatively new and is being overruled herein in the first adversary proceeding in which it has been applied. On the other hand, our present interpretation is the same as the Commission's 1967 interpretation that was submitted to Congress in connection with the 1968 amendments to the FPA. See Op. 88, at 32-39. Unfortunately, the rationalization apparently was not reduced to a written form, which we will now undertake in conformity with the above-quoted portion of *Chisholm*.

The Municipal Preference Revisited

We turn, first, to the licensing scheme of the FPA, which is not in dispute. Section 4(e) authorizes the Commission to issue licenses for the development of water power in bodies of water over which Congress has jurisdiction, or upon the public lands and reservations of the United States. Section 6 limits the maximum term of licenses to fifty years, without provision for renewal. Therefore, a licensee that wants to remain as such beyond an initial period of fifty years is required by Section 15(a) to apply for a "new license". In the event that a "new license" is not issued by the time an "original license" expires, the Commission avoids a hiatus of ownership and control by issuing an "annual license to the then licensee under the terms and conditions of the original license", pursuant to the proviso of Section 15(a).

Section 7(a) is the provision of the FPA that contains the standards to be applied in selecting between or among

railway within the meaning of the exemption provisions of the three statutes, and that the North Shore was part of the general steam-railroad system of transportation. The Seventh Circuit held that the ICC could come to a different conclusion as to the North Shore's status, and did so properly, notwithstanding the Supreme Court's 1933 decision as to the North Shore's status under a substantively identical statutory provision.

adversary applicants for preliminary permits, and initial and subsequent licenses. The first (or municipal) preference of Section 7(a) directs the Commission to give preference to applications of States and municipalities "in issuing licenses to new licensees under section 15 hereof". Accordingly, the municipal preference refers immediately to Section 15(a) to ascertain what is said about issuing licenses to "new licensees":

SEC. 15. (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain and operate any project or projects of the licensee, as provided in section 14 hereof, *the Commission is authorized to issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

As is evident from the text, Section 15(a) authorizes the Commission to issue a new license to the "original licensee" or a "new licensee". In context, the "original licen-

see' is an applicant-licensee in possession of the project works, and a "new licensee" is any *other* applicant seeking authority to acquire the projects works.

In the light of the reference in Section 7(a) to Section 15(a), the plain meaning of "new licensees" in Section 7(a) is the same as in Section 15(a). In other words, the municipal preference of Section 7(a) directs the Commission to give preference to applications of States and municipalities in issuing licenses to applicants other than "original licensees" in possession of the project works.

We find that the meaning of "new licensees" in the municipal preference of Section 7(a) is clear, plain and reasonable. Consistent with the rules of statutory construction, our interpretation gives "new licensees" the same meaning in Section 7(a) as in 15(a), and gives meaning to all of the words of the municipal preference, neither adding nor omitting words.¹² Simply stated, the Commission must select a "new licensee" when the "original licensee" in possession of the project works does not apply for a new license, or is found by the Commission to be out of the running for a new license. In selecting the "new licensee", the Commission is required by the municipal

¹² It is a time-honored rule of statutory construction that statutes are to be construed to give effect to every word used and in such a way that no clause or word is left without meaning. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); 2A Sutherland, *Statutory Construction* § 46.06 (C. Sands 4th ed. 1973).

It is an equally well-settled principle of statutory interpretation that terms or phrases used in different parts of a statute are to be interpreted consistently, unless there is clear evidence that Congress intended them to be read otherwise. *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427 (1932); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 387 n.5 (1980) (Steward, J., dissenting). As the Court noted in *Atlantic Cleaners*, it is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." 286 U.S., at 433.

preference of Section 7(a) to give preference to States and municipalities over all *other* applicants—meaning, applicants other than the “original licensee” if the “original licensee” applies and is found to be out of the running, or obviously excluding the “original licensee” if the “original licensee” does not apply.

As between the “original licensee” in possession of the project works, and a State or municipal applicant—that is, “as between other applicants—meaning, adversary combinations of applicants other than those covered by the municipal preference,

... the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region. . .

pursuant to the second preference of Section 7(a).

Bountiful, on the other hand, interprets “new licensees” in Section 7(a) as including both “original licensees” and “new licensees” within the purview of Section 15(a), in violation of the rule of statutory construction that words should be given the same meaning throughout a statute. In so doing, *Bountiful* also interprets the disputed phrase of Section 7(a) as omitting three words, specifically, “in issuing licenses under section 15 hereof”. Alternatively, *Bountiful* reaches the same result by adding words to the disputed phrase of Section 7(a) (Op. 88, at 11, n. 15), specifically, “in *determining whether to issue* licenses to new licensees under section 15 hereof”. As indicated, our interpretation is straight-forward and uses the exact language of the statute, without diminution or augmentation.

We turn, next, to the legislative history. *Bountiful* begins with the first paragraph of Section 7 of the Administration Bill, H.R. 8716, that was introduced in the 65th Congress, 2d Session, on January 18, 1918:

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities. . . .

Bountiful concedes that there are no words expressly including or excluding "new licenses", but argues that the phrase, "in issuing licenses," without limiting words, is broad enough to refer to all licenses and, therefore, refers to subsequent as well as initial licenses.

Although the phrase in question is *broad enough* to refer to all licenses, the absence of words expressly including or excluding "new licenses" led Congressman Sims, Chairman of the Committee on Water Power, to believe that the Administration Bill did *not* contain a municipal preference that was applicable to relicensings. During the course of the hearings, on March 27, 1918, only three months after the Administration Bill was introduced, Congressman Sims stated categorically that such a preference was not in that bill:

The CHAIRMAN. Mr. Secretary, it has been very seriously urged before the committee as a part of the recapture provision that we provide that if the United States Government did not want to avail itself of the recapture provision that a State or municipality which wanted the water power for State or municipal purposes should have the second opportunity and the preference over a private licensee.

Secretary LANE. I think that was in one of the bills, was it not? [¹³]

¹³ See Op. 88, at 16, for a brief discussion of the Adamson, Ferris, Myers and Shields bills that immediately preceded the Administration Bill.

The CHAIRMAN. It is not in this one.

Bountiful traces through Congress the various changes to the first paragraph of Section 7 of the Administration Bill, and states as to each that there was no expressed intent to eliminate the municipal preference against "original licensees" that was contained in the Administration Bill, as introduced. Since the asserted preference was said in *Bountiful* to be a silent one that existed because of the absence of qualifying words, the asserted preference obviously wouldn't have been addressed by members of Congress, such as Chairman Sims, who failed to discern the broad scope attributed to the original language. And, since *Bountiful* concedes (Op. 88, at 25) that the particular language "made it appear that the municipal preference applied only to the issuance of preliminary permits and some initial licenses," there is no substance to the rationale that there was no expressed intent to eliminate the municipal preference against "original licensees", in the Administration Bill.

The Administration Bill, as amended, was referred to a conference on September 30, 1918. The report of the conference was introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died. Another Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and, on June 24, 1919, that bill was reported without change to the Committee of the Whole House.

On the following day, June 25, 1919, Gifford Pinchot (Pinchot), who was then President of the National Conservation Association, wrote to Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, proposing numerous changes to Senator Jones' water power bill, S. 152, in which Section 7 was identical

to Section 7 of the bill reported out of conference in the previous session. Section 7 stated in pertinent part,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities. . . .

Borrowing language from Senator Lenroot's S. 1192, which was a pro-conservationist revision of the water power bill reported out of conference the previous session, Pinchot suggested to Senator Jones:

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words, "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import.

On September 12, 1919, the Committee on Commerce reported the House-approved bill to the Senate with amendments in which the first paragraph of Section 7 was changed in the exact manner suggested by Pinchot.

At this point in the analysis, the *Bountiful* opinion turns to the language of the first paragraph of Section 7 just prior to the amendment, concludes that Section 7 contained a silent relicensing preference for States and municipalities,¹⁴ and reasoned that the Pinchot-suggested amendment merely clarified Section 7 so that the municipal

¹⁴ But, as the Supreme Court said in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942), at 11, "The search for significance in the silence of Congress is too often the pursuit of a mirage." And, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), at 592, "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."

preference therein would “surely”—using Pinchot’s word—apply to relicensings. We agree with *Bountiful* that the significance of the Pinchot-suggested amendment should be judged in the light of the language that was changed. But we believe, contrary to *Bountiful*, that Section 7 did not, immediately prior to the amendment, contain a relicensing preference for States and municipalities. That amendment gave them a *limited* relicensing preference.

Turning to the pre-amendment language, we are *constrained* to concede that the issuance of a license “where no preliminary permit has been issued” conceivably might be construed as including a “new license”. Since preliminary permits are issued only for proposed water power developments, and “new licenses” are issued only for existing developments, no “new license” would ever follow a preliminary permit and, therefore, all “new licenses” arguably qualify as “licenses where no preliminary permit has been issued”. Such an interpretation is too strained.

Furthermore, if the pre-amendment language included “new licenses”, entitlement to the preference literally would have depended on whether the existing water power development was initially permitted, and then licensed, or simply licensed without a prior permit. It would be absurd to believe that only the latter would qualify as new “licenses where no preliminary permit has been issued”.

Prior to the amendment suggested by Pinchot, the first paragraph of Section 7 did not contain a relicensing preference for States and municipalities because the language appears to have been limited to applications for preliminary permits and initial licenses only. It is beyond dispute that Section 7 gave States and municipalities a permitting preference for proposed water power developments. And it is also beyond dispute that Section 5 gave preliminary permittees a licensing preference for proposed developments, even against States and municipalities that had not sought the permitting preference. As a result, it was nec-

essary in Section 7 to exclude from the municipal preference applications for initial licenses when preliminary permits had been issued, which the pre-amendment language did. As a result, the pre-amendment language appears to have been limited to preliminary permits and some initial licenses, as *Bountiful* concedes, *supra*.

It may be true that the proponents of the Administration Bill intended to include a relicensing preference for States and municipalities, and we do not dispute that the language of that bill was broad enough to include such a preference, albeit in silence. But the language of the Administration Bill was changed several times in the 20 months between its introduction and the consideration of the Pinchot-suggested amendment to a successor bill by another Congress. And *Bountiful* concedes that particular language changes did not always accomplish the stated purposes of the changes. As a result, any relicensing preference for States and municipalities that may have been contained in the Administration Bill as introduced was amended out of the bill, perhaps inadvertently, by the time Pinchot suggested his amendment to Senator Jones. The Committee on Commerce amended the bill as it appeared in September 1919, rather than what the Administration Bill may have said 20 months earlier in January 1918. Accordingly, we interpret the Pinchot-suggested amendment as providing a limited relicensing preference for States and municipalities, where none had existed before. Adversary relicensings between States or municipalities, and "original licensees" in possession of project works, were thereby left to the Commission's judgment under the "best adapted" standard of the second preference of Section 7.

Bountiful gives great weight to the statement of Congressman Lee on May 4, 1920, when the FWPA was passed by the House, that

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.

Congressman Lee didn't say that the bill gave a preference to States and municipalities over any other applicant *in receiving new licenses*. He said that the bill gave a preference over any other applicant *in acquiring properties of another licensee*. Since "original licensees" in possession of project works that apply for new licenses do not *acquire properties* of another licensee if they receive the new license, Congressman Lee obviously was not speaking of a preference against "original licensees". He said that States and municipalities have a relicensing preference over any other applicant—meaning, other than the "original licensee"—in acquiring properties of another licensee—meaning, properties of the "original licensee"—at the end of a license period. And that is consistent with our interpretation that States or municipalities have a relicensing preference against all adversary non-preference applicants other than "original licensees" in possession of project works.¹⁵ Indeed, *Bountiful* fails to cite any statement in the legislative history of the FWPA that indicates, unambiguously, that the water power bill contained a State

¹⁵ It is also consistent with the part of Section 15(a) that speaks of *new licensees* paying the amount, and assuming the contracts, that the United States would pay and assume, "before taking possession of such project or projects". If Congressman Lee had intended the result in *Bountiful*, he would have said, in substance,

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant in the case of both new and existing developments.

and municipal relicensing preference against an "original licensee".¹⁶

Contrary to *Bountiful* (Op. 88, at 51), there is nothing absurd about a State or municipal relicensing preference that is limited to strangers to the original license (new licensees) and, consequently, excludes "original licensees". Such a preference is not limited to worthless water power developments for which "original licensees" wouldn't reapply for licenses, and "new licensees" wouldn't compete. An "original licensee" might be a manufacturing concern that fails, or decides to relocate elsewhere, for reasons not associated with the worthiness of the hydro-electric development, in which case preference and non-preference applicants may become adversaries for acquiring the hydro-electric properties of a perfectly valuable development. Or, an "original licensee" may be unwilling to accept the terms and conditions of a new license, in which case preference

¹⁶ The only reasonably contemporaneous unambiguous statement to that effect of which we are aware is the *obiter dictum* statement of Judge Clayton in *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606 (M.D. Ala., 1922), at 617:

In further regard to the scope of the [FWPA], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license.

Judge Clayton had been a member of Congress until 1914, four years before the Administration Bill was introduced and six years before the amended bill became the FWPA. It should be observed that he spoke of the original "lessee", a term used in earlier water power bills, that he called the Federal Water Power Act the "Federal Power Commission Act" at 613, and that he also called the Federal Power Commission the "Water Power Commission" at 620. These errors suggest confusion between the FWPA as finally signed and earlier legislative proposals, and, under such circumstances, we are not persuaded by his statement.

and nonpreference applicants may also become adversaries for acquiring the properties of a worthwhile development.

Nor is there anything absurd about the absence of a relicensing preference for States and municipalities that are "original licensees". *Bountiful* merely assumes that Congress intended the municipal preference of Section 7(a) to cover all licensing situations in which States and municipalities compete against citizens, associations of citizens, and corporations. But, as is stated in Senate Report No. 180, 66th Congress, 1st Session, dated September 12, 1919, at 3, "This bill proceeds on the theory of private development with ultimate public ownership possible." The history of the FWPA establishes time and time again that private capital was ready to develop the nation's water resources, whereas public capital was not. As a result, it should not be surprising that Congress did not focus on the possibility of a State or municipality becoming an "original licensee". And it is not absurd for a State or municipal "original licensee" to prevail in an adversary relicensing if it continues to have the best adapted plan for beneficial public uses of the waterway, just as a nonpreference "original licensee" should prevail if it continues to have the best adapted plan.

Section 7(a) was *not* amended in 1968 in the light of such an interpretation. As early licenses approached their expirations in the 1960's, the Commission was asked by the Chairman of the Senate Commerce Committee to determine whether any amendments to the relicensing provisions were needed. 113 Cong. Rec. 26,185 (1967). The Commission responded that the municipal preference of Section 7(a) did not apply against "original licensees" and, consequently, recommended that Congress leave Section 7(a) unchanged so that relicensing decisions involving "original licensees" would be based without preference on the merits of relicensing applications. As a result, Con-

gress amended some of the relicensing provisions, but left Section 7(a) intact.¹⁷

Next, we turn to the effects of interpreting "new licensees" in Section 7(a) one way or the other. Section 7(a) describes two preferences, or standards, to be applied by the Commission in choosing between or among adversary applicants in four areas of potential competition for preliminary permits and licenses, as follows:

- (1) Preliminary permits
- (2) Initial licenses not associated with outstanding preliminary permits
- (3) New licenses, when the adversaries necessarily would become "new licensees"
- (4) New licenses, when the adversaries include "original licensees"

The four areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

If the plans of States or municipalities are better adapted than, or as well adapted as, the plans of adversary citizens, associations of citizens, or corporations, the Commission

¹⁷ See letters from the Commission's Chairman to the Vice President and the Speaker of the House, and the Chairman's testimony before the pertinent Committees. Hearings on S. 2445 before the Senate Commerce Committee, 90th Cong., 2d Sess. at 6, 13-14, 19 (1968); Report of the House Interstate and Foreign Commerce Committee, H. Rep. No. 1643, 90th Cong., 2d Sess. at 8 (1968); Hearings on H.R. 12608 before the House Comm. on Interstate and Foreign Commerce at 19, 23 (1968).

is directed by the first preference of Section 7(a) to give States or municipalities preference with respect to (1) preliminary permits, (2) initial licenses not associated with outstanding preliminary permits, and (3) new licenses—but only when the adversary applicants necessarily would become new licensees. On the other hand, “as between other applicants”, or, stated another way, as between (a) States or municipalities *inter se*, and (b) citizens, associations of citizens, or corporations *inter se*, the Commission is authorized (but not required) by the second preference of Section 7(a) to give preference with respect to (1) preliminary permits, (2) initial licenses ~~not~~ associated with outstanding preliminary permits, and (3 and 4) new licenses, irrespective of whether the adversary applicants necessarily would become “new licensees”, or include “original licensees”. The Commission is also authorized (but not required) by the second preference of Section 7(a) to give States or municipalities adversary to citizens, associations of citizens, or corporations, preference with respect to (4) new licenses—but only when the adversary applicants include “original licensees”.

Our interpretation covers all of the possible combinations of adversaries in all of the areas of potential competition, and provides a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the “equally well adapted” or the “best adapted” standard to the issuance of all (1) preliminary permits, (2) initial licenses not associated with outstanding preliminary permits, (3) new licenses when the adversaries necessarily would become “new licensees” and (4) new licenses when the adversaries include “original licensees”, depending on whether any applicants are States or municipalities, and, in some cases, “original licensees”. There will be no regulatory gaps in any situation, except as intended; and the

claim to the contrary in *Bountiful* (Op. 88, at 52), is simply wrong.

One of the principal purposes of the FWPA was to provide a relationship between Government and industry in which private capital would begin immediately to develop our nation's water resources. Congress realized that some provision would have to be made for those developments upon the expiration of the initial 50-year terms. As Secretary of the Interior Franklin K. Lane testified, before the Committee on Water Power,¹⁸

... We need development, and when a plant has been going for 50 years you can not throw the people who are dependent upon it and the industries into the air. It has got to continue to run. If it is a project that we [the Government] want ... we will be able to take it under this or any other bill that I have seen.

* * *

... [I]t must be recognized that there may be some plants that the Government itself will not want to take over, that it will not be advisable for the Government to take over, and care should be exercised so that those plants can be allowed to continue in operation under certain kind[s] of reasonable rule or regulation or provision by which the people who have put the money in and who are operating it under the Government lease or other people can have it, and that its operation will be continuous.

The Secretaries of the Interior, Agriculture and War caused the Administration Bill to be drafted. As Secretary

¹⁸ Hearings before the Committee on Water Power, 65th Congress, 2nd Session, at 454-455.

of War Newton D. Baker testified, before the Committee on Water Power,¹⁹

The purpose of this bill was to have a 50-year term, and at the end of the 50-year term . . . the Government was to have the three options of either taking over the property, granting it to a new licensee, or regranting it to the original licensee or his successors in interest. The intention of the bill was to make those three options identical, so far as the financial obligation was concerned. If the Government took it over, it would pay X dollars; if it granted it to a new licensee, the new licensee would pay X dollars; if it re-granted it to the original licensee, it would ascertain and fix, as a new starting point for his net investment, X dollars, the same number of dollars in each instance.

Our interpretation is consistent with the intent of treating the three alternatives as being identical, not only with respect to the financial obligation, but also as to the selection of the particular alternatives. As discussed in the next section, Congress delegated to the Commission the initial authority and responsibility to choose among the three alternatives on the basis of public interest considerations. *Bountiful*, on the other hand, does not treat the three alternatives as being identical because it provides a preference in relicensings against "original licensees".

The fact that the FWPA provided financially identical alternatives indicates that Congress did not intend the wholesale transfer of hydro-electric properties from private to municipal hands that some now envision under *Bountiful*. Congress obviously foresaw some transfers, principally to the United States. But, Congress could not and did not foresee the near constant inflation spanning the

¹⁹ Id., at 680-681.

past half-century that has triggered the preference controversy.

As is discussed in *Bountiful* (Op. 88, at 4), the preference controversy is bottomed on the bargain *cost-related* (rather than *value-related*) price embodied in the "net investment" concept of the FPA, that the United States or a new licensee would pay to the original licensee before taking possession of a hydro-electric development. The "net investment" concept was designed in a period of wartime inflation when it was generally believed that inflation was a cyclical and temporary matter, to be followed by deflation. Thus, the respective proponents of a cost-related or value-related takeover or relicensing price were ideologically reversed from the situation today. See 42 FPC, at 334. See, also, Justices Brandeis' and Holmes' contemporaneous dissenting argument favoring a cost-related rate base in *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), wherein they said, at 302, that a *value-related* rate base "may subject investors to heavy losses when the high war and post-war price levels pass—and the price trend is again downward."

Having lived through all or a significant part of the period covered by the table below²⁰ the members of Con-

²⁰ The following tabulation is compiled from the General Price Index (which we note officially) on pages 231-2 of the 1949 edition of *Historical Statistics of the United States, 1789-1945*, prepared by the Bureau of the Census, United States Department of Commerce:

GENERAL PRICE INDEX (1913 = 100)

1861- 70	1881- 85	1901- 81
1862- 79	1882- 87	1902- 84
1863- 96	1883- 84	1903- 86
1864-129	1884- 79	1904- 86
1865-127	1885- 77	1905- 88
1866-123	1886- 76	1906- 91
1867-117	1887- 77	1907- 93

gress in 1920 knew generally that the post-Civil War inflation was followed by a long period of relatively stable prices, and then a period of sharply rising prices as World War I spread. The post-World War I deflation came, but was not as sharp or deep as might have been expected. Certainly, the members of Congress in 1920 could not have foreseen the near constant inflation spanning the half-century following 1933 that has placed such great dollar values on privately owned hydro-electric properties and made them such bargains at cost-based relicensing prices.

Sections 7(a) and 10(a) in Adversary Relicensings

Although this is the first adversary proceeding to reach the Commission in which a State or municipality and an original licensee (that is not a State or municipality) are seeking a new license for the same water resources, it is the second one to reach the Commission in which two or more applicants sought a new license for the same water resources. The first was *Escondido*²¹ in which the second

1868-114	1888- 78	1908- 91
1869-111	1889- 77	1909- 94
1870-102	1890- 78	1910- 97
1871- 99	1891- 77	1911- 96
1872-102	1892- 76	1912-100
1873-100	1893- 75	1913-100
1874- 96	1894- 71	1914-100
1875- 92	1895- 72	1915-103
1876- 87	1896- 71	1916-117
1877- 84	1897- 72	1917-139
1878- 78	1898- 73	1918-157
1879- 77	1899- 77	1919-173
1880- 82	1900- 79	1920-193

²¹ *Escondido Mutual Water Company, et al.*, Project No. 176, Opinion No. 36 issued February 26, 1979, 6 FERC ¶61,189; *mod. on reh.* Opinion No. 36-A issued November 26, 1979, 9 FERC ¶61,241; *rev. and rem.* (on grounds not pertinent here) *sub nom Escondido Mutual Water Company, et al. v. Federal Energy Regulatory Commission*, 692 F.2d 1223 (9th Cir., 1982); *mod. and reh. den., concur, and dissent* 701 F.2d 826 (1982); *pet. cert. pend.* (No. 82-2056).

preference of Section 7(a) was applied "as between other applicants".²² *Escondido* was the first Commission decision to consider the interaction in an adversary relicensing of the Section 7(a) mandates for selecting a licensee, and the Section 10(a) mandate to condition *all* licenses to achieve the best adapted comprehensive plan for beneficial public uses.

Although it may not be readily apparent from the face of the decision, the Commission found in *Escondido* (Op. 36, at 79-93) that, as a practicable matter, the Section 7(a) selection of a licensee and the Section 10(a) conditions had to be considered concurrently. One of the reasons given for rejecting the Indians' application was the Commission's judgment (Op. 36, at 84, n. 118) that "the individual interests of particular Bands appear to conflict with the comprehensive plan which is adopted herein."

The project adopted, which in the Commission's judgment will be best adapted to a comprehensive plan for beneficial public uses of a waterway, is essentially the product of the proposals in a licensing application, the contentions of interested parties and the expertise furnished by the Commission, its staff and others.²³ The proj-

²² A "hybrid" applicant consisting of Escondido Mutual Water Company, a not-for-profit corporation, and the City of Escondido, California, a municipality, was treated as a citizen, association of citizens, or corporation, consistent with rules later adopted by the Commission. See 18 CFR § 4.33(g). Their opponents were five Bands of Indians who claimed a preference but were found not to be a municipality.

²³ There are many facets to the "public interest". There are local, State, regional and national interests, among other possible geographic groupings, involving a variety of public concerns which sometimes complement, and sometimes compete with, one another. Since we are a Federal agency created by an act of Congress, we are concerned principally with the national "public interest" which includes our 1977 general mandate, *infra*, to carry out our national energy policy through private enterprise to the maximum extent practicable, as well as our 1920 specific mandate favoring the ultimate public control of water

ect which is best adapted for beneficial public uses is neither fixed nor static and, as a result, the Commission's judgments with respect thereto can change over time and with conditions.

As enacted in 1920, the first paragraph of Section 7 of the FWPA directed the Commission to select permittees and licensees on the basis of how well their plans were adapted to conserve and utilize, or to develop, conserve, and utilize, "in the public interest the navigation and water resources of the region". The words "navigation and" were deleted when the first paragraph of Section 7 was transformed into Section 7(a) in 1935 "for the purpose of clarifying the broad objective of the act to secure Commission control over all projects involving the development of the Nation's water resources."²⁴

As enacted in 1920, Section 10 directed:

That all licenses issued under this Act shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purpose of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme the commission shall have authority to require the modification of any proj-

power sites.

Since there are many facets to the public interest, the Commission obviously cannot be aware of the multitude of State and local public interests unless they are formally brought to the Commission's attention. The terms of a license for a particular water resource could, therefore, vary considerably, depending upon what interests intervene and make known their concerns.

²⁴ Senate Report No. 621, 74th Congress, 1st Session, at 44.

ect and of the plans and specifications of the project works before approval.

Section 10 was amended in 1935, *supra*, at 4, n. 8, and Senate Report No. 621, 74th Congress, 1st Session, explained, at 45,

In keeping with the change made [to Section 7], subsection (a) is amended to provide that as a condition of the issuance of a license the project shall be such that, in the judgment of the Commission, will be best adapted to a comprehensive scheme "for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce", instead of the more limited "for the purpose of navigation". It also adds to the other beneficial public uses to which the project may be adapted an express provision that the Commission may include consideration of recreational purposes.

In the light of the 1935 amendments to Sections 7 and 10(a), and the official explanations, it is apparent that *the selections of (a) the licensee, and (b) the best adapted comprehensive plan, are to be based on the same public interest standard*. While Section 7(a) expressly directs that the selection be based on the public interest, Section 10(a) has been interpreted consistently by the Commission, and the courts, as requiring the comprehensive plan to be based on the same standard.²⁵ And, whereas the focus of Section 7(a) is the conservation and utilization of water resources, or the development, conservation and utilization of water resources, the focus of Section 10(a) is the broader comprehensive plan for beneficial public uses, which includes the (development,) conservation and utilization of water

²⁵ Note 9, *supra*, at 5-6.

resources.²⁶ Accordingly, *the expressed scope of the Section 7(a) public interest inquiry is subsumed within the broader scope of the Section 10(a) public interest inquiry.*

Furthermore, Section 4(g), added in 1935, authorizes the Commission (emphasis added):

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and *in the public interest to conserve and utilize the navigation and water power resources of the region.*

The last part tracks closely (but not exactly) the language of Section 7(a). Senate Report No. 621, 74th Congress, 1st Session, explained, at 43,

A new subsection (g) is added to section 4 to authorize the Commission to investigate the occupancy of power sites on waters under its jurisdiction, and to issue appropriate orders to

²⁶ Although the 1935 phrase in Section 10(a), "comprehensive plan . . . for the improvement and utilization of water power-development", admittedly is awkward, its meaning becomes clearer from the 1920 phrase, "comprehensive scheme of improvement and utilization for the purpose of . . . water-power development", from which it is derived. Whatever else those phrases may mean, a scheme or plan contemplating the construction of improvements for a hydro-electric development, and the operation of that development (including the generation, transmission and utilization of electric power), necessarily includes the utilization as well as the conservation of the water resources associated with the development.

preserve its authority over the navigable waters entrusted to its care.

Section 4(a) of the FPA, enacted in 1920, authorizes the Commission to investigate "the utilization of the water resources of any region to be developed. . . ." In the light of the phrase "region to be developed", the term "region" in Section 7 of the FWPA (now Section 7(a) of the FPA) appears to refer to the geographic area covered by an applicant's plans. In the further light of the 1935 amendments to Sections 4, 7 and 10(a), and the official explanations, it also appears that Congress crafted the term "waterway or waterways" for Section 10(a) to be synonymous with the 1920 "region" in Sections 4(a) and 7. As indicated, the focus of Section 10(a) is the comprehensive plan *for improving or developing a waterway or waterways* for beneficial public uses, which covers the approximate geographic area covered by the 1935 Section 4(g) "region" associated with an occupied power site, and the Section 7(a) "region" associated with an applicant's plans, and ordinarily does not extend beyond the basin or basins that are to be, or have been, improved or developed.²⁷ Since the scope of the Section 7(a) inquiry is subsumed within the scope of the Section 10(a) inquiry, the Section 7(a) "water resources of the region" should not ordinarily extend beyond the waterway basin or basins that are to be, or have been improved or developed, as to which the Commission's licensing action ordinarily is most meaningful.²⁸

²⁷ *Escondido* involved a trans-basin conveyance of water and, therefore, the Commission's inquiry included the basin from which the water was conveyed as well as the basin to which it was conveyed. The geographic and other factors were such that the Commission's action was meaningful to both basins.

²⁸ The natural reading of the original phrase, "the navigation and water resources of the region," favors an interpretation that covers geographically the waterways that would be or are utilized, and the resources of those waterways that would be or are conserved and developed. Since the question in both preferences of Section 7(a) is

Since the municipal preference of Section 7(a) directs the giving of priority, and the second preference authorizes (but does not require) the giving of priority, rather than the issuance of a license,²⁹ and since the expressed scope

whether the *plans* are equally well, or best, adapted, etc., and since those plans ordinarily focus on the waterways or portions of waterways that would be or have been developed, it does not seem plausible that Congress directed the Commission to base its judgment on a "region" that extends beyond the approximate geographic limits of the plans to be considered. Today's regional power grids did not exist in 1920, and Congress was simply trying to describe a geographic area that would be flexible according to circumstances from one development to another, and in which the Commission's licensing action would be meaningful. Congress, in 1935, appears to have confirmed such an interpretation, particularly in the light of Section 4(g) which relates the phrase "of the region" to the power sites which it authorized the Commission to investigate.

²⁹ As is the case whenever an agency's actions are open to interpretation, the parameters of the municipal preference will be developed as this and future Commissions are confronted in adversary relicensings with new factual situations, and attempt resolutions that are either upheld or overturned by the courts. Certain parameters, however, are evident to us.

First, and perhaps foremost, the first preference of Section 7(a) does not direct the issuance of a license. It mandates the giving of preference, which means an advantage or priority. But that falls short of requiring the issuance of a license to the preference applicant in all cases, and leaves room for the issuance of a license to the non-preference applicant, instead.

Second, the municipal preference is mandatory insofar as it states that "the Commission shall give preference. . . ." But that directive becomes operative only if—"provided"—the plans of the preference applicant "are deemed by the Commission"—which calls for an exercise of the Commission's judgment—to be as well adapted as the plans of the non-preference applicant to conserve and utilize the water resources "in the public interest"—which provides a "public interest" standard for that judgment. In other words, a State or municipality is not entitled automatically to a preference, which "is not an absolute one" (*Holyoke Water Power Co., et al.*, Project Nos. 2004 and 1014, 8 FPC 471 (1949), at 487). The entitlement depends on an evaluation by the Commission of current public interest factors. As Congressmen Doremus and Raker

of the Section 7(a) public interest inquiry is subsumed within the broader scope of the Section 10(a) public interest inquiry, *supra*, there may be areas of public interest consideration outside Section 7(a) that are within the purview of Section 10(a). For example, the Initial Decision found that PP&L's and JOA's plans are equally well adapted to conserve and utilize in the public interest the water resources of the region insofar as those plans pertain to power production, flood control, fish and wildlife, and recreational facilities, all of which are appropriate areas for public interest consideration under Sections 7(a) and 10(a). But the Initial Decision also found, at 40, that economic impacts

are beyond the scope of matters entrusted by Congress to the Commission's purview under Section 7(a) and thus are not . . . applicable, relevant and material to a determination of the broad public interest in this proceeding.

The rationalization is premised, at 38, on the notion that

. . . Section 7(a) of the Act requires the Commission to afford the municipal applicant, whose plan is not "equally well adapted," an opportunity to cure, "within a reasonable time," any deficiencies found by the Commission and thus make its plan "equally well adapted." The only

said on the floor of the House:

MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.

MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

reasonable inference is that Congress had in mind deficiencies of a quality and nature such that a willing and able municipal applicant could, within a reasonable time, overcome them and prevail in the license contest.

For the reasons hereinbefore discussed, we do not and cannot agree that the municipal preference of Section 7(a) is applicable to this adversary relicensing proceeding. The applicable provision is the second preference of Section 7(a) "between other applicants", under which the Commission is authorized, but not required, to

give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region. . . .

On the other hand, the expressed scope of the public interest inquiries of both preferences of Section 7(a) are identical for practicable purposes and, as indicated, subsumed within the broader scope of the Section 10(a) public interest inquiry. We will, therefore, examine the rationale of the Initial Decision in the light of the municipal preference of Section 7(a) on which it is based.

We do not and cannot agree that incurable deficiencies are to be excluded from public interest consideration under Section 7(a). If that were the case, every State or municipality ultimately would be able to obtain a license by changing its plans, if it chooses to do so. Such an interpretation is inconsistent with the language of Section 7(a) that grants a *preference*, as distinguished from *the license*, *supra*. It is also inconsistent with the language that requires the Commission to make a public interest judgment with respect to whether a State or municipality is entitled to the preference, which is not absolute, *supra*. The exclusion of incurable deficiencies would reduce that judgment to a nullity.

Furthermore, the exclusion of incurable deficiencies from public interest consideration under Section 7(a) could lead to absurd results, as illustrated by the following hypothetical situations:

Assume, in a hypothetical adversary relicensing in which the municipal preference is applicable, that all Sections 7(a) and 10(a) public interest considerations are equal, except that the Commission is persuaded by the relative economic impacts of the alternative licensings³⁰ that the

³⁰ The perceived economic benefits for an applicant's ratepayers underlies every license application to construct a hydro-electric development, or to continue to operate and maintain an existing development. Therefore, when deciding whether the claimed benefits should be enjoyed by the ratepayers of one applicant or the other, the Commission must scrutinize the claims and weigh the economic impacts of its licensing action. Economic impacts have always been an appropriate area for public interest consideration under Section 10(a), and the statement in the Initial Decision, at 40, that they are not relevant to a determination of the public interest in this proceeding, is simply wrong. A half-century ago, before the FWPA became the FPA, the Commission said in one of its earliest reported decisions, *Great Northern Power Company*, 1 FPC 124 (1933), at 126 (emphasis added),

The Federal Water Power Act clearly expresses its prime purpose to give preference to development projects promising the best use of the water resources. Section 4(a) indicates the broad scope of *economic* and engineering studies to this end; section 7 specifically defines the basis for preferential treatment of applicants; and section 10(a) specifies "beneficial public uses" as the test to be applied in the Commission's final judgment.

With the plain intent of the law in mind, the Commission must consider *all* the facts bearing upon the local need for utilization of the waters of the Sultan River, especially as related to conflicting rights.

The *Escondido* Commission considered economic impacts (Op. 36, at 89), and the *Bountiful* Commission said (Op 88, at 60,

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as economic costs

best adapted plan for beneficial public uses, including the utilization of the power, requires that the power be enjoyed by the segment of the public served by the non-preference applicant. If economic impacts are not within the scope of Section 7(a) consideration, as the Initial Decision determined, the Commission would be required by the municipal preference of Section 7(a) to break the tie by issuing the license to the State or municipality, and by Section 10(a) to include a condition requiring all the power to be sold at cost to the adversary citizen, association of citizens, or corporation, for its ratepayers. In 1920, Congress could

and benefits, the distribution of the benefits of hydro-power and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Furthermore, the Supreme Court said in *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953), at 171 (emphasis added),

... The arguments involve technical engineering and *economic* details which it would serve no useful purpose to canvass here. ... Judgment upon these conflicting engineering and *economic* issues is precisely that which the Commission exists to determine. ...

And the District of Columbia Circuit, in *National Hells Canyon Association, Inc. v. Federal Power Commission*, 237 F.2d 777 (D.C. Cir., 1956, cert. den. 353 U.S. 924 (1957)), said, at 779-780, that the recurrence in Sections 7(b) and 10(a) of the phrase, "in the judgment of the Commission",

emphasizes the broad discretion as to these technical matters which Congress has committed to the Commission. 'Judgment upon these conflicting engineering and economic issues is precisely that which the Commission exists to determine,' said the Supreme Court ...

in the foregoing case.

not have intended such an arrangement.³¹

Assume, in another hypothetical relicensing in which the municipal preference is applicable, that all Sections 7(a) and 10(a) public interest considerations are equal, that the Commission is persuaded that the best adapted comprehensive plan requires an additional storage reservoir, and that the adversary applicants are willing to build such a reservoir, but the State or municipality is unable to obtain the financing. Although the inability to raise the funds would be an incurable deficiency, the Commission would be required by Section 7(a) to break the tie by issuing the license to the applicant that couldn't carry out the best adapted comprehensive plan.

There is a fundamental flaw in the rationale of the Initial Decision that the parts of the applicants' plans should be weighed individually against one another (power production, flood control and the like), without also weighing the plans as a whole against each other. We can understand that the individual parts can be changed to the satisfaction of the State or municipality. And we can also

³¹ In the light of the technical limitations of the 1917-20 period when the FWPA was being formulated, Congress undoubtedly intended the municipal preference to be a vehicle for giving preference applicants an advantage in acquiring the use of water power sites for their own ratepayers. Electric utilities are limited to economic transmission distances, which were considerably shorter than they are today, and by impediments to interconnections, such as polarity, cycle and voltage differences, which have largely disappeared today. Furthermore, the United States was not generally electrified, but moved rapidly toward electrification in urban areas in the 1920's and in rural areas in the 1930's.

Today, with almost universal electrification, much longer transmission distances, regional power grids, and automatic switching and dispatching devices, the technical means for operating a hydro-electric development for another's ratepayers are available. But it would be absurd for any preference applicant receiving a license to do so without obtaining some benefit for its own ratepayers.

understand that an assignment of all the benefits to the citizen, association of citizens, or corporation, would not be viable option to the State or municipality. But we find that the "plans" of an applicant include the goal of operating and maintaining the development under a license, as well as the many parts that are set out in the numerous exhibits to the application for the license.³²

Additionally, we do not agree with the statement in the Initial Decision, at 38, that the municipal preference of Section 7(a) requires the Commission to allow preference applicants an opportunity to cure deficiencies "found by the Commission". As is discussed in *Bountiful* (Op. 88, at 26), a comma and the words "or shall be made equally well adapted," were added to Section 7 through a floor amendment proposed by Congressman Sinnott, who explained (58 Cong. Rec. 2038 (1919)),

The object of my amendment is to enable the municipality to modify or amend its application provided the application first filed is not equally well adapted to developing the water resources as the application filed by some other individual or corporation. I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think, if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity to mod-

³² The word "plan" has a number of meanings. The most appropriate ones in the context of a plan of an applicant are "a detailed formulation of a program of action" and "an orderly arrangement of parts of an overall design or objective". *Webster's New Collegiate Dictionary*, G.&C. Merriam Co., 1977 edition. Note the relationship between "detailed/program" and "parts/objective"—that a plan includes the entirety formed by the pieces, as well as the pieces themselves.

ify and amend its plan and make it as good and as efficient as any other plan filed.

Later, the phrase, "within a reasonable time to be fixed by the Commission," was added to Section 7 to "make more clear and certain the meaning of the House provisions", as Senate Report No. 180, 66th Congress, 1st Session, characterized most of the changes therein.

Congressman Sinnott was interested only in the substantive right of amendment sometime during the licensing process. He did not indicate how or when that right should be implemented, nor did he suggest any requirement that the Commission inform a State or municipality of specific reasons why its plans are not as well adapted as those of another applicant. Congressman Sinnott was concerned that one or more citizens, associations of citizens, or corporations, might submit better ideas, and he wanted to make sure that States or municipalities would have an opportunity to copy or improve upon those ideas. That falls short, however, of imposing an obligation on the Commission to articulate shortcomings in a State's or municipality's plans, and to give the applicant an opportunity to remedy those perceived shortcomings.^{33 34}

³³ We do not suggest that the Administrative Procedure Act doesn't require an articulation of rationale in a final agency action, but there is no associated substantive right to amend a licensing application.

Furthermore, the notion that Section 7(a) *requires* an opportunity to cure deficiencies "found by the Commission", is probably derived from 18 CFR § 4.33(g)(4), which applies to adversary applications for preliminary permits and licenses for *proposed* water power developments, and provides, in pertinent part,

... the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans.

The fact that such an opportunity is provided in that situation does not make it a statutory requirement. Plans associated with proposed

We find that the seventeen words "or shall within a reasonable time to be fixed by the Commission be made equally well adapted" guarantee States or municipalities an opportunity and a reasonable period of time to render their plans as well adapted as, or better adapted than, any other plans, if they are willing and able to do so—to the end that their plans may be at least as well adapted as any other plans when the Commission passes judgment on the adversary plans. Under current procedures, that judgment is exercised, first, through an initial decision of an administrative law judge, and then through an opinion and order of the Commission on exceptions to that initial decision.

Lastly, the rationale of the Initial Decision, at 38, appears to say that the municipal preference of Section 7(a) requires the Commission to provide some sort of post-hearing opportunity to cure deficiencies found in plans of States or municipalities. Such a procedure would seem to

hydro-electric developments involve infinitely more possibilities than plans associated with existing developments, wherein adversary applicants propose to continue to operate and maintain the same project works. Such works must be designed for proposed hydro-electric developments, and the Commission *staff* attempts through comments to effect the best designs for each situation.

³⁴ Although the second preference of Section 7(a) is applicable to this adversary relicensing proceeding, we find that JOA has had a reasonable time fixed by the Commission to make its plans as well adapted as those of PP&L to conserve and utilize in the public interest the water resources of the Lewis River. PP&L filed the first application on April 26, 1976, and the application was made available to the public. The Commission issued and published notice of the filing on August 20, 1976, at about the time JOA was formed, and JOA filed its application six months later on February 18, 1977, within the time fixed by the Commission in 18 CFR § 16.3(b). Since PP&L was the first applicant, and JOA and its constituent PUD's had almost ten months to make its plans as well adapted as those of PP&L, and in fact utilized PP&L's plans in part, JOA had the opportunity with which Congressman Sinnott was concerned to make its plans as well adapted as those of PP&L.

require multiple steps in adversary relicensings, and conflict with the one-step relicensing procedure that was legislated into the FPA in 1968. See *Bountiful* (Op. 88, at 32-33).

In any event, we do not read the municipal preference of Section 7(a) as requiring such a post-hearing opportunity, particularly because any *curable deficiencies found by the Commission* can be remedied through the imposition of license conditions. The municipal preference requires, first, a Commission judgment as to whether the plans of the State or municipality and the other applicants—are equally well adapted, etc. If they are, or if the plans of the State or municipality are better adapted, the matter ends there, for the State or municipality must be offered the license. But if the plans of a citizen, association of citizens, or corporation are judged better adapted, and if the State or municipality has a post-hearing right to cure deficiencies that have been found (contrary to our interpretation), the municipal preference would appear to require a second judgment as to whether the plans of the State or municipality are capable of being made equally well adapted within a reasonable period of time. If they are, the matter would end there, for the State or municipality must be offered the license subject to conditions that would make the plans equally well adapted.³⁵ And if they are not, the matter would also end there, under the maxim that the law does not require the doing of useless acts. In that case, the citizen, association of citizens, or corporation, with the better adapted plans would be offered the license.

Since *every* project must be such as in the judgment of the Commission will be best adapted to a comprehensive plan for beneficial public uses, *including the utilization of*

³⁵ States or municipalities with deficient plans would not lose any substantive rights if the Commission offers them licenses subject to conditions that make their plans equally well adapted.

water power (which is part of the Section 7(a) public interest inquiry as well as the Section 10(a) public interest inquiry), and since Section 7(a) directs or authorizes the giving of preference, which falls short of directing the issuance of a license, Section 7(a) must be interpreted in a manner that is consistent with Section 10(a). We hold, therefore, that the economic impacts of an adversary licensing action are an appropriate area for public interest consideration under both preferences of Section 7(a), as well as Section 10(a). If all other considerations are equally well adapted to (develop,) conserve and utilize in the public interest the water resources of the region and the economic impacts favor a citizen, association of citizens, or corporation, over a State or municipality, the license must be issued to the citizen, association of citizens, or corporation.

If the Commission has the right to deny a license on the ground that a proposed project is not best adapted for beneficial public uses of a waterway, *Namekagon Hydro Company v. Federal Power Commission*, 216 F.2d 509 (Seventh Cir., 1954), the Commission also has a right to deny a license to a particular applicant within the framework of Section 7(a) on the ground that the (development,) conservation and utilization of the water power by that applicant is not best adapted for beneficial public uses of the waterway. We agree, in this connection, with Commissioner Moody's 1973 dissenting statement, 50 FPC, at 692, that *Namekagon* "clearly indicates that we should deny that which cannot be modified to serve the public interest."

In summary, Section 7(a) is the provision of the FPA that contains the standards to be applied in selecting between or among adversary applicants for preliminary permits and licenses. Section 10(a), on the other hand, is the provision that contains the standard for fixing the terms and conditions of all licenses. Although certain limitations associated with the 1920 public interest are attached to

Section 7(a), licensees and the terms and conditions of licenses are selected on the basis of the same public interest standard under which, currently, consumers of all classifications should receive the benefits³⁶ of inexpensive hydro-electric power without regard to whether they are served by public or private entities (sic) If the public interest favors the consumers served by a private entity, Sections 7(a) and 10(a) require the license to be issued to that entity to permit its consumers to receive the benefits.

The Current Public Interest

In 1920, Congress crystallized in Section 7 of the FWPA a conception of that era that a permitting and licensing preference for States and municipalities was in the public interest. However, Congress also left room for the Commission to pass judgment on entitlement to that priority based on current conceptions of the public interest when licenses expire.³⁷ The judgment is to be based on how well the plans of the respective applicants are adapted to (develop,) conserve and utilize the water resources of the region.

The legislative history of the FWPA discloses that Congress was concerned with the development of our nation's water power resources at a time when the Federal, State and local governments were not generally prepared to fi-

³⁶ In the light of the technical limitations of the 1917-20 period (note 31, *supra*), consumers served by a particular hydro-electric development ordinarily would receive its benefits by utilizing the power generated by the development. Today, questions of utilization are largely academic; consumers receive the benefits of a particular hydro-electric development through computed rates and are thus said to "utilize" the particular power.

³⁷ The notion that relicensings should be determined on evaluations of *current* public interest factors goes back to President Theodore Roosevelt's landmark Rainy River veto message in 1908, which sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time."

nance the construction of hydro-electric projects to any great extent, but power trusts and monopolies were ready and willing to take up that slack. These "water power grabbers" were viewed by Gifford Pinchot and others as being "eager for plunder"³⁸ and, as a result, a water power bill developed that proceeded on the theory of private development with ultimate public ownership *possible*.³⁹

Although that policy crystallized in the FWPA may have reflected the 1920-era public interest, the foundation for a change evolved during the ensuing decade as the holding company form of business organization gained popularity. By 1932, systems in eight large holding company groups generated about three-fourths of the output of all privately owned systems.⁴⁰

The stock market crash nine years after the enactment of the FWPA precipitated the Great Depression and a wave of reform legislation, including the Public Utility Act of 1935 that changed the electric power industry significantly. Title I of that Act, known as the Public Utility Holding Company Act of 1935 (15 U.S.C. § 79), (1) authorized and directed the Securities and Exchange Commission, among other matters, to simplify the corporate structures of public utility holding companies, including electric utility holding companies, eliminating some of them, and (2) placed the remaining and resulting holding companies, together with their operating subsidiaries under the regulatory authority of that agency. Title II of that Act amended the Federal Water Power Act by designating the 1920 provisions (as amended) as Part I, adding Parts II and III, and changing its name to the Federal

³⁸ See *Chemehuevi Tribe of Indians v. Federal Power Commission*, (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n. 54.

³⁹ Senate Report No. 180, 66th Congress, 1st Session.

⁴⁰ The 1970 National Power Survey of the Federal Power Commission, at I-2-2.

Power Act. Part II of the FPA authorizes and directs the Commission, in Section 202, to take certain actions for the purpose of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources".

Section 202 was the Commission's first major new mandate and, in our opinion, it altered significantly the Part I focus on a State or municipality "acquiring properties of another licensee at the end of a license period," in the words of Congressman Lee. Section 202 empowers and directs the Commission to divide the United States into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and to modify those districts from time to time in such a manner as in the Commission's judgment will promote the public interest. Furthermore, Section 202 says that it shall be the *duty* of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. "The essential thrust of § 202," according to the Supreme Court,⁴¹

is to encourage voluntary interconnections of power. . . . Only if a power company refuses to interconnect voluntarily may the Federal Power Commission . . . order the interconnection. The standard which governs its decision is whether such action is "necessary or appropriate in the public interest."

Since Congress thus enlarged the FWPA into the FPA, it has directed the Commission to temper the assessment of the 1920 Part I public interest by an assessment of the 1935 Part II public interest. And that is equally true with

⁴¹ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), at 373.

respect to subsequent legislation amending, and independent of, the FPA.

Even Gifford Pinchot foresaw the overriding importance of large interconnected transmission systems. In 1923, while he was Governor of Pennsylvania, Pinchot wrote to the Governor of New York to attempt to persuade the withdrawal of litigation challenging the validity of the FWPA.⁴²

... I have come confidently to expect the growth of a nation-wide interlocking power system; no small part of this future power development, especially water-power development, will, I believe, be made by state municipal enterprise—some, perhaps, by national or even international undertakings. . .

* * *

The freedom of commerce among the several states, the unrestricted exchange across state lines of services, goods and resources guaranteed by the Federal Constitution, is the strongest man-made basis of the prosperity of each state. This consideration applies not only to energy riding in a coal car, but equally to energy floating over a wire, whether the burning of fuel or the falling of water was the source. Furthermore, really cheap power cannot be supplied to consumers unless the burning coal and the floating water contribute their energy to a common reservoir for the common supply of industries, farms, homes, and railroads.

Such a system must transcend state lines and is likely to become nation wide. The new art of

⁴² *Federal Water-Power Legislation*, by Jerome G. Kerwin (Kerwin), Columbia University Press, 1926, at 286.

electric transmission is already so developed that the giant power system with which we are immediately concerned should now include all power producers and consumers in the northern section of the United States and should perhaps draw also upon resources of water power in Canada.

Beginning with the Act of March 7, 1928 (45 Stat. 200, 212-213), involving the development of power on the Flat-head Reservation, but principally in the years following the Public Utility Act of 1935, the Commission was given a number of mandates under a variety of statutes, most of which were specific, but some of which were of a general nature. For example, the Commission is required by the National Environmental Policy Act of 1969 to consider the environmental consequences of its "major Federal actions significantly affecting the quality of the human environment". If, therefore, the choice of licensees in a given situation would have a significant environmental impact, as, for example, if the choice would require the losing applicant to construct new or replacement capacity, and one of the applicants has an environmentally superior alternative source of capacity that is not available to the other, the Commission could decide that the environmental consequences of its choice should be the determining factor.

In 1977, the Federal Energy Regulatory Commission was created as an independent agency within the Department of Energy to supersede the Federal Power Commission, and was given a number of new mandates under the Department of Energy Organization Act. Congress found in Section 101 of that Act that "the United States faces an increasing shortage of nonrenewable energy resources" and that

this energy shortage and our increasing dependence on foreign energy supplies present a serious threat to the national security of the United

States and to the health, safety and welfare of its citizens. . . .

And Congress declared in Section 202 that the purposes of that Act, among others, were "to place major emphasis on the development and commercial use of . . . technologies utilizing renewable energy resources", such as water resources, and, concurrently, "to assure, to the maximum extent practicable, that the productive capacity of *private* enterprise shall be utilized in the development and achievement of the policies and purposes of this Act . . . [Emphasis added]."

Most recently, the Public Utility Regulatory Policies Act of 1978 gave the Commission certain mandates under a newly established program to encourage the development of small hydro-electric projects in connection with existing dams, as well as the authority to order permanent interconnections that was lacking at the time of the *Otter Tail* decision, *supra*.

The growth of the Commission's statutory responsibilities was paralleled by a growth of the responsibilities of State regulatory bodies. Beginning in 1838 when the New Hampshire Public Utilities Commission was formed, but principally as the end of the nineteenth century approached, many states began to form units that were charged with the regulation of public services, such as rail services. These railroad, or public service, or public utility, commissions, as they were called, grew in number and authority throughout the twentieth century, with the result that today every State except Nebraska has a utility commission with regulatory jurisdiction over the rates of privately owned electric utilities.⁴³ And Nebraska is served entirely by public power entities and cooperatives.⁴⁴

⁴³ 1977 Annual Report on Utility and Carrier Regulation of the National Association of Regulatory Utility Commissioners, at 393.

⁴⁴ The 1970 National Power Survey of the Federal Power Commission, at I-2-6.

As of the end of 1920, when the FWPA was enacted, less than 5,000 MW of the estimated 146,000 MW, or about 3%, of the total estimated conventional hydro-electric power potential of the 48 contiguous States had been developed. As of the end of 1970, a half-century later, more than 52,000 MW, or about 36%, of that estimated potential was developed.⁴⁵ Some of the estimated 94,000 MW of undeveloped capacity is precluded from development by statutes such as the Colorado River Basin Project Act (43 U.S.C. § 1501) and the Wild and Scenic Rivers Act (16 U.S.C. § 1271). The following table taken from The 1970 National Power Survey of the Federal Power Commission, at I-7-9, shows that while investor owned utilities dominated the development of water power in the 20 years following the enactment of the FWPA, Federal and non-Federal public authorities have dominated that development in more recent years.

TABLE 7.2
Conventional Hydroelectric Capacity by Class of Ownership,
Forty-Eight Contiguous States, 1920-1970

[Thousands of Megawatts]

Class of Ownership	Installed		Capacity:		Year	
			Ended			
	1920	1930	1940	1950	1960	1970
Investor-owned utilities.....	3.5	7.7	8.5	9.7	13.4	16.6
Non-federal utilities	0.2	0.7	1.1	1.5	4.4	12.1
Federal.....	*0.0	0.2	1.7	6.5	14.6	22.9
Industrial	1.1	1.1	1.1	1.0	0.7	0.7

⁴⁵ Id. at I-7-21.

Total, all plants	4.8	9.7	12.4	18.7	33.1	52.3
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* Less than 50 MW.

In the light of (1) the growth of the Commission's statutory responsibilities and those of State regulatory bodies, particularly the evolution at the State level of universal electric utility rate regulation in the private sector,⁴⁶ (2) the demise and simplification of public utility holding companies, and (3) the shift from the private to the public sector in the development of water power, including the fact that a substantial number of sites (presumably the best) are no longer available for development, we find it impossible to continue to see privately owned electric utilities in the eyes of Gifford Pinchot as "water power grabbers" who are "eager for plunder". *We see them, instead, as regulated entities serving segments of the public, just as public power entities serve other segments of the public.* As a result, we believe that the Part I public interest in the ultimate public ownership of water power sites is considerably weaker today than in 1920.^{47 48} As a further result,

⁴⁶ See Sections 19 and 20 of the FPA which authorized the Commission to regulate rates, charges, services and the issuance of securities, and prohibited unreasonable discriminatory and unjust rates, charges and services, until such matters were brought under State regulation and control.

⁴⁷ The Commission is contributing to the weakening of that public interest through the policy of relicensing projects for 30-year terms absent unusual circumstances or certain exceptions justifying longer terms, such as substantial new investment. This policy requires new decisions on private or public ownership more often than the maximum 50 years allowed. See *South Carolina Electric & Gas Co.*, Project No. 1894, 53 FPC 537 (1974), and *The Montana Power Company*, Project No. 2301, 56 FPC 2008 (1976). Furthermore, Congress thus far has not enacted any legislation to take over any hydro-electric project, although most recently a bill was introduced to take over the Escondido Project No. 176.

⁴⁸ The Part I "public interest" was fractured by the Act of August 15, 1953, as amended (16 U.S.C. §§ 828-828c), which provides that

we believe that the focal point of the Part I public interest today is the impact on consumers of choosing between an "original licensee" in possession of project works, and a "new licensee"—without regard to whether the consumers are characterized as domestic, rural, commercial, industrial or in some other manner, because the cost of electricity is reflected not only in the bills paid to the local distributor, but also in the prices paid for goods and services.

THE NEW LICENSE

In General

Having determined (1) (*supra*, at 18) that the second preference of Section 7(a) is applicable to this adversary relicensing, (2) (*supra*, at 28) that the selection of the licensee and the best adapted comprehensive plan are to be based on the same public interest standard, and (3) (*supra*, at 33, n. 30, and 39) that the economic impacts of an adversary licensing action are an appropriate area for public interest consideration under Section 7(a) as well as Section 10(a), we have weighed the economic considerations together with all other considerations that are relevant to the "best adapted" standards of Sections 7(a) and 10(a). And we have concluded that the new license for the Merwin hydro-electric development should be issued to PP&L under the conditions that are contained in Ordering Paragraph (F).

We have reviewed the non-issues (*i.e.*, the April 1982 Stipulations) as well as the issues addressed in the Initial Decision, and, for the reasons discussed therein, we are unable to find any significant differences in the plans of

Section 14 of the FPA, among others, is not applicable to developments owned by States and municipalities. Accordingly, a licensee or the United States must pay a value-related condemnation price, rather the cost-related net investment price as enacted in 1920, if it wants to acquire water power properties from a State or municipality.

PP&L and JOA insofar as concerns power production⁴⁹, flood control,⁵⁰ fish and wildlife⁵¹ and recreational facilities, as to which reference is made to the special license conditions contained in Ordering Paragraph (F). Furthermore, we have no reason to question JOA's ability to finance the acquisition of the Merwin hydro-electric development, or the ability of either applicant to finance the development's continued operation and maintenance. Nor do we have any reason to doubt that JOA would become as sensitive and responsive to local public needs as PP&L has demonstrated (EX. T-1, at 23-32; Tr. 263-265 and 270-271).

In this instance, the economic implications of the alternative licensing actions clearly weigh in favor allowing the power benefits of the Lewis River at Merwin to remain with the segment of the public served by PP&L. We therefore focus our discussion on that aspect of this adversary relicensing.

⁴⁹ PP&L contends in its Assignment of Error No. 16 that the issuance of the license to JOA would result in a loss of secondary power and thus significantly change the production of power at Merwin. We have not found it necessary to pass on that contention in view of our decision on other grounds to issue the license to PP&L; and, since there are no other claimed differences, we have accepted the conclusion of the Initial Decision for the purpose of this decision.

⁵⁰ In view of the recent consummation of a flood control agreement, *infra*, the substance of its terms has been incorporated into the new license as Article 43. Since the agreement obligates the Yale and Swift hydro-electric developments to contribute to flood control storage, Article 54 requires PP&L to amend its licenses for those developments to add identical special conditions.

⁵¹ PP&L contends in its Assignment of Error No. 30 that the wildlife management plan, which it has begun to implement utilizing non-project lands, would be delayed up to five years if the license is issued to JOA. Since the Merwin hydro-electric development has been operated by PP&L for almost a half-century without such a program, such a delay would not amount to a significant difference between the applicants' wildlife management plans.

Economic Impacts

JOA's constituents, Clark and Cowlitz PUD's, serve 118,200 customers in Clark and Cowlitz counties, Washington. PP&L, on the other hand, serves 643,400 customers in scattered portions of six states, Washington, Oregon, California, Idaho, Montana and Wyoming. The following table derived from Exhibit 52 compares their respective 1981 electric customers, energy sales and revenues:

COMPARISONS OF 1981 ELECTRIC CUSTOMERS, ENERGY SALES, AND REVENUES

NUMBER OF CUSTOMERS

<u>Class</u>	<u>Clark/Cowlitz</u>	<u>PP&L</u>
Residential	106,199	550,411
Industrial/Com- mercial	11,352	92,475
Other	661	565
Total	<u>118,212</u>	<u>643,451</u>

SALES (MWh)

<u>Class</u>	<u>Clark/Cowlitz</u>	<u>PP&L</u>
Residential	2,137,129	6,940,201
Industrial/Com- mercial	4,504,162	11,484,298
Other	46,350	4,581,146
Total	<u>6,687,641</u>	<u>23,005,645</u>

REVENUES (\$1,000)

<u>Class</u>	<u>Clark/Cowlitz</u>	<u>PP&L</u>
Residential	\$40,085	\$196,315
Industrial/Com- mercial	52,934	259,820

Other	1,485	121,599
Total	<u>\$94,504</u>	<u>\$577,734</u>

When antitrust issues are raised, as they have been in this proceeding, electric utilities are treated as direct competitors of one another to the extent that they have common or contiguous service areas and, therefore, could be alternative suppliers of electric energy. See *Connecticut Light and Power Company*, Docket No. ER78-517, 8 FERC ¶61,187 (1979), rehearing denied 9 FERC ¶61,313 (1979). In this sense, PP&L and JOA are direct competitors of one another to the extent that PP&L's service area in Portland, Oregon, and the vicinity, lies across the Columbia River from Clark County, Washington. None of PP&L's other service areas are within or border Clark or Cowlitz counties, Washington.

PP&L generates electric power at 40 facilities from the following sources of energy (Item A, at 6-7):

	Number of Plants	Name Plate Rating (MW)
Hydro-electric	33	863.4
Steam electric	5	2,450.2
Combustion Turbine	1	23.8
Nuclear electric	1	30.4
	<u>40</u>	<u>3,367.8</u>

Merwin, the second largest of PP&L's hydro-electric developments, has a name plate rating of 136 MW and thus represents 15.8% of its hydro-electric capacity and 4% of its total capacity.

The Merwin hydro-electric development is interconnected with PP&L's interstate transmission system which, in turn, is interconnected with the transmission lines of the Northwest Power Pool, including those of the Bonne-

ville Power Administration (BPA).⁵² Furthermore, Merwin is operated under the Pacific Northwest Coordination Agreement (Item D) in electrical coordination with the

⁵² The following portion of the Initial Decision, at 24-26, is not in dispute and is repeated here for convenience:

An appreciation of the parties' contentions requires some understanding of the role played by BPA in the Pacific Northwest, especially its function as marketing agent for electricity produced by federally developed (as opposed to federally licensed) hydroelectric projects. The ensuring account is taken primarily from Ex. T-1, p. 4-23, and *Legislative History of the Pacific Northwest Power Planning and Conservation Act*, prepared by Bonneville Power Administration Library (Department of Energy, 1981).

The development of the Columbia River system began in the 1930's. From the beginning, the federal government has played a major role. Congress directed BPA in the Bonneville Project Act of 1937 to build and operate transmission lines and to market electricity from federally developed hydroprojects on the river at rates set only high enough to repay the federal investment over a reasonable time period (16 U.S.C. § 832).

In the early 1960's the U.S. and Canadian governments negotiated a treaty for the cooperative use of dams built by Canada on the upper reaches of the river to provide, among other things, reservoir storage for production of additional power at the U.S. dams downstream. Also in the 1960's, Congress authorized construction of three major powerlines linking the Columbia River hydroprojects with power markets in California and the rest of the Pacific Southwest.

With the dams developed in Canada and the United States, the Columbia River system provided virtually all the electricity needed in the Pacific Northwest until the early 1970's. Thereafter, the region's publicly-owned and investor-owned utilities turned mainly to coal-fired and nuclear plants to meet load growth throughout the Pacific Northwest.

The Bonneville Project Act of 1937 directed the publicly-owned utilities and cooperatives be given first call on available federal hydropower resources. They consequently came to be known as "preference customers." It was not until the 1970's that their preference needed to be exercised and, in 1973, BPA refused to renew long-term firm power contracts with investor-owned utilities since it could not do so if pref-

Northwest Power Pool (Item A, at 5) and in hydraulic coordination with PP&L's other hydro-electric developments on the Lewis River (Item B, at 18; Item A, Exhibit

erence customers were to continue to have first call on federal resources. Nonetheless, BPA continued to sell some peaking power to those private utilities and also "non-firm" power to the region's investor-owned utilities and utilities outside the region when electricity surplus to the needs of the preference customers was available.

Because of the extensive historical involvement of the federal government in the region's electrical power systems Congress began to address the difficult questions arising from the growing pressures on a regional power supply that had once seemed inexhaustible. After three years of deliberation, in 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act") (16 U.S.C. § 839). The statute defines the Pacific Northwest region essentially to include the area consisting of Oregon, Washington and Idaho, the portion of Montana west of the Continental Divide, and such portions of Nevada, Utah and Wyoming that are within the Columbia River drainage basin.

The Regional Act directs that BPA should continue its traditional role of transmitting and marketing power, but gives it additional responsibilities. BPA now must acquire all necessary energy resources to serve all utilities (public and private) in the region who choose to apply to BPA for wholesale power supplies. It may purchase the generating capabilities of needed new thermal plants and must spread the benefits and cost of resources among all of its customers through its rates.

Sales to publicly-owned utilities and cooperatives continue, under the Regional Act, to be governed by the supply preference Project Act of 1937. However, for the first time, a similar preference and price advantage is extended to investor-owned utilities' residential (and farm) customers in the Pacific Northwest region: the utilities sell to BPA, at their average power cost, an amount of energy equal to their residential loads; BPA sells back enough energy at BPA standard rates to cover these loads, with the rates advantages required (sic) to be passed on to such customers.

As matters stand now, the benefits of the region's low-cost, federally developed hydropower are made available first under BPA's priority firm (PF) rate to its preference customers and (through the exchange contracts mentioned above) the regional residential customers served by investor-owned utilities are billed at BPA's higher new resources (NR) rate (Ex. T-45, pp. 9-13).

I, at 1-2; PP&L's Brief on Exceptions, at 2, 27-28).⁵³ As a result, PP&L receives power (in addition to the power it generates) from public and other private utilities, BPA, and the Columbia Storage Power Exchange (CSPE) (Tr. 696-700), which markets Canada's share of downstream power benefits derived from water storage developments in Canada (Item E, at U-5).

Clark and Cowlitz PUD's, on the other hand, purchase almost all of their requirements from BPA. Clark PUD obtains the balance from CSPE and the Washington Public Power Supply System (WPPSS) Packwood project (Ex. T-17, at 3; Item E, at U-4 and 5). And Cowlitz PUD obtains the balance from CSPE, the Wanapum and Priest Rapids hydro-electric developments (on the Columbia River) of Grant County PUD No. 2, and, beginning in September 1983, its own Swift No. 2 run-of-the-river hydro-electric development on the Lewis River (Project No. 2213, 16 FPC 1281). (See Item E, at U-4 and 5; Ex. E-54A; Ex. T-12, at 13.)

The focal point of the adversary positions in this proceeding has been the cost of alternative power. If the new license were to be issued to JOA, Clark and Cowlitz PUDs would purchase less power at the Priority Firm rate from their principal supplier, BPA, and would thereby release that relatively inexpensive power for sale to other preference customers of BPA. PP&L, on the other hand, would replace the lost Merwin power. In the short term, PP&L could replace part by purchasing relatively inexpensive BPA power that is presently available at the same Priority Firm rate⁵⁴, or by generating or purchasing more expen-

⁵³ Project No. 2071 (Yale), licensed in 1951 (10 FPC 917), and Project No. 2111 (Swift No. 1), licensed in 1956 (16 FPC 117).

⁵⁴ Approximately 20% of PP&L's 550,000 residential customers, which is equal in number to all of Clark and Cowlitz PUDs residential customers, are located in California and Wyoming and, consequently, would not receive the benefit of any purchases of BPA power at the Priority

sive thermal power. In the longer term, PP&L could build a thermal generating facility⁵⁵ or purchase BPA power that may be available at the New Resources rate, which, in turn, will consist essentially of relatively expensive thermal power.

According to a JOA witness, Clark PUD's cost of power would decrease by \$4,500,000 for its fiscal 1983 if Merwin were licensed to JOA, and Cowlitz PUD's similar cost would decrease by \$3,200,000, for a total of \$7,700,000 (Ex. T-19B, at 11). According to the same witness, and assuming that PP&L replaced its Merwin power with BPA power at the 1982 New Resources rate, PP&L's cost of power would increase by \$26,300,000 (Ex. T-20, at 4). As a result, PP&L's power costs would increase by \$3.42 for each \$1.00 savings in JOA's power costs, if Merwin were licensed to JOA rather than PP&L.

According to a Commission staff witness, JOA's short term net revenue requirements would decrease by \$1,701,000 annually if Clark and Cowlitz PUD's could replace their BPA purchases with Merwin power (Ex. E-68B, Schedule 1: Line 5 minus Line 6). And PP&L's short term net revenue requirements would increase by \$15,169,000 annually if PP&L were able to replace its Merwin power at its average system cost (Ex. E-68B, Schedule 1: Line 2 minus Line 1). As a result, PP&L's net revenue requirements would increase by \$8.92 for each \$1.00 decrease in JOA's net revenue requirements, if Merwin were licensed to JOA rather than PP&L.

With respect to long term economic impacts, the Commission staff's present-worth cost (including fuel) of op-

Firm rate. Nor would any of PP&L's 92,000 commercial and industrial customers, wherever located, receive the benefit of any such purchases.

⁵⁵ PP&L would measure the cost of alternative power by the \$832,400,000 cost of a 161 MW coal-fired cycling plant in eastern Oregon, but will accept for this purpose the staff's calculation of \$731,700,000.

erating a 161 MW coal-fired plant to be available in 1988 is \$731,700,000 for 50 years. In comparison, PP&L's estimated cost of continuing to operate the Merwin hydroelectric development for the same period of time is only \$26,800,000 (Ex. T-16, at 9). On the other hand, no evidence of JOA's alternative costs for 50 years was introduced. But no one has challenged the statement in the Initial Decision, at 35, that no reliable long-term projection of future BPA rates can be made.

In view of the complexities involved, we are satisfied with approximations of the magnitude and direction of the economic implications of choosing one applicant or the other. And with the foregoing short and long term figures in mind, we adopt as our own the following paragraphs on pages 32 through 35 of the Initial Decision (emphasis added):

At the outset, it must be emphasized that the record does not permit a determination of precise cost and rate impacts on PP&L and JOA of relicensing the Merwin project upon which the Commission could reasonably rely with confidence. Neither staff nor either of the applicants has made a presentation which could be relied upon to the exclusion of the others; no party appears to urge to the contrary and, as PP&L concedes, "the circumstances of this case preclude a neat arithmetical calculation determining the exact economic impact in each of the next 50 years" (PP&L Reply Br. p. 24). Nor may clear-cut comparisons be made between the presentations of staff and the applicants since, as described above, the presentations address different time frames and employ differing costing methods. What can be reasonably determined is the general, relative cost and rate impacts on the applicants resulting from relicensing, and the appropriate parameters within which such impacts should be addressed.

The key to these relative impacts is the cost of alternative power to each of the competitors. To the extent that one applicant has an alternative power cost higher than the other, it is indisputable that such applicant will inevitably, on a system-wide basis, experience greater total dollar cost burdens without Merwin than will be saved by the other applicant with Merwin. The evidence is convincing that PP&L, whether it is forced to build a new thermal plant to replace Merwin, substitutes BPA power purchased at the NR rate, or (in the very short term) steps up generation from its existing production facilities, will incur a higher alternative power cost over all relevant periods than JOA. BPA's PF rate, which defines JOA's alternative power cost and is supported by cheap federal hydro-power resources, is now and can be expected to remain at a level below any alternative power cost of PP&L.

Certain other facts are well established. First, approximately eighty percent of PP&L's residential customers are located in the Pacific Northwest and will be served under the residential exchange provisions of the Regional Act and receive the benefits of BPA's PF rate (rather than being exposed to PP&L's average power costs), whether or not PP&L receives the Merwin license. Therefore, relicensing will have no rate impact on these regional residential customers, and the full systemwide cost impact from PP&L's loss of Merwin would have to be borne by PP&L's remaining customers. Second, to the extent that PP&L looks to purchases from BPA under the NR rate to replace lost Merwin production, such purchases are available only to meet PP&L's requirements (other than residential exchange requirements) in the Pacific Northwest region: cost and rate impacts on any of PP&L's customers in California and Wyoming cannot be measured by direct reference to the

BPA NR rate (Tr. 1693). Cost impact calculations which measure PP&L's cost of all replacement power at the BPA NR rate are, to this extent, misleading. Third, while PP&L would derive larger total dollar system benefits by retaining Merwin than would JOA from acquiring Merwin, the benefits per system residential customers clearly favor the JOA members.

This last observation raises the question whether great and perhaps controlling weight should be given, as JOA contends, to the benefits conferred on residential customers. There are cogent reasons why the benefits per system customer, or per residential customer, should not be determinative.

The calculation of benefits per system customer would automatically favor the competitor with the fewer number of customers, without regard to the mix of customers or their requirements. Further, giving great weight to such a calculation would inherently mean that larger benefits for the few take precedence over small benefits for the many. Such a conclusion hardly comports with the public interest. Nor should consideration be limited to benefits per residential customer. . . .

. . .

Returning once again to the relative cost burdens and benefits on just the systems of the two applicants, staff is correct that the primary focus should be on long-term impacts. But staff's blithe dismissal of new coal-fired thermal generation by PP&L to replace Merwin as "unplanned," and its attempt to bury the lost Merwin capacity in PP&L's projected need for 5,000 [MW] of added capacity by the year 2000, are not persuasive. By 1985, PP&L will be deficient in power supply (Ex. T-20, p. 3). A substitute for the cheap Merwin supply will, in the long term, have to come from somewhere. The only serious long-term

substitutes advanced and supported on this record are thermal generation installed by PP&L or purchases by PP&L from BPA at future NR rates. But, as staff itself recognizes, long-term reliance on BPA purchases contemplates that PP&L will provide capacity to the pooled resources and, as noted, PP&L will be capacity deficient after 1985. The Pacific Northwest as a whole has a power surplus that is currently projected to last for only ten years. While, as PP&L concedes (Reply Br. p. 22), the NR rate may be buffered for a time by low-cost hydropower not needed to serve loads under the [PF] rate, the reasonable inference is that beyond that surplus period, *new resources—for the most part coal-fired generation (Ex. T-11, pp. 32-33)—will have to be committed to the BPA system, and will constitute the principal, if not the sole, supply for NR service which will be priced accordingly. Thus, it is not at all unreasonable to anticipate that Merwin power would eventually be replaced by PP&L at a cost reflecting that of a future coal-fired generation.*

JOA argues in its brief opposing exceptions that PP&L doesn't need to replace Merwin power in the long term. JOA asks that we take official notice of part of a Form 10-K Report that PP&L filed with the Securities and Exchange Commission on March 31, 1983, disclosing that PP&L is (or was at the time) engaged in preliminary negotiations for the sale of its 10% interests in two 700 MW coal-fired generating units near Colstrip, Montana, that are expected to be completed in 1984 and 1985, respectively. And JOA argues that because (1) PP&L would dispose of 140 MW of generating capacity (compared to Merwin's 136 MW), and (2) an energy surplus is forecast for the Pacific Northwest into the 1990's, PP&L's alternative costs should not be measured by the hypothetical coal-fired plant, or by the cost of replacement power at BPA's New Resources rate or PP&L's average system costs. According to JOA,

The proper measure of the economic cost to the customers of PP&L if Merwin is licensed to JOA is the increased average cost of service to PP&L's customers resulting from removing the cost of Merwin generation from PP&L's resource mix.

JOA offers a calculation derived from PP&L's FERC Form No. 1 annual report for 1982 to establish that PP&L's lost revenues, less Merwin expenses, would have been \$8,570,000 for 1982, which compares to an estimated savings to JOA customers from Merwin of \$7,700,000 for 1983.

We will not accept JOA's calculation because it was not offered into evidence and has not been subjected to cross-examination, especially with respect to the assumptions. But it is significant that even JOA does not claim an economic balance in favor of its customers. It can claim only that the balance is not as one-sided as is claimed by PP&L and the Commission staff.

The point missed by JOA is that electric utilities that generate their own power, such as PP&L, are expected to have reserve generating capacity to provide for system reliability. One rule of thumb is that they should have enough reserve capacity to replace the unanticipated outage of their largest generating unit.⁵⁶ As a result, it is not surprising, and is indeed expected, that PP&L can

⁵⁶ We take official notice of the following paragraph on page I-15-7 of The 1970 National Power Survey of the Federal Power Commission:

Individual systems and power pools utilize a variety of methods for determining appropriate reserve levels. The methods vary from use of a simple percent of peak load, to matching reserves to the capability of the largest unit or pair of units in service, to very complicated calculations of outage probability taking into consideration such elements as number and size of units, forced outage rates, and expected load patterns. Reserve margins considered adequate for most systems, including the spinning reserve component, range between 15 and 25 percent of peak load.

likely get along without Merwin for the foreseeable future, particularly in the light of the projected energy surplus for the Pacific Northwest. But that does not mean that PP&L's alternative costs should be measured by dropping Merwin from its resource mix, which, hypothetically, would diminish PP&L's system reliability.

The economic environment of the electric power industry in the Pacific Northwest was changed dramatically in 1980. As a result, it is not possible to project very far into the future the dollar impacts associated with the Regional Act. But it is possible to envision the direction they will take.

The Regional Act gave BPA the responsibility, which it did not previously have, for meeting the full future requirements of preference customers.⁵⁷ As a result, JOA will have access for all of its customers to BPA's Priority Firm power, derived principally from BPA's existing Bonneville, Grand Coulee and other hydro-electric and thermal facilities. PP&L will also have access to that power, but only for its residential and farm customers in Washington, Oregon, Idaho and Montana.

On the other hand, PP&L will have a power deficit using only its own resources, including Merwin, from 1984-85 forward (Ex. T-20, at 3). Therefore, PP&L *may*—if it builds thermal capacity—have access for its commercial and industrial customers, and its residential and farm customers in California and Wyoming, to BPA's New Resources power, which is a blend of available hydro-electric power, and thermal power. With the passage of time, and assuming continuation of the inflation that has prevailed for the past half-century, the cost of BPA's New Resources power should reflect to an increasing extent the future costs of new thermal capacity and fuel, including of course the capacity that PP&L would build to gain access to the New

⁵⁷ Legislative History of the Pacific Northwest Electric Power Planning and Conservation Act, at vii.

Resources power. As a result, BPA's New Resources power should become considerably more expensive than its Priority Firm power, which should continue to reflect the embedded costs of BPA's existing hydro-electric capacity. And, while approximately 440,000 of PP&L's residential and farm customers should not be affected by our choice of the licensee, we have concluded that the adverse economic impacts on PP&L's remaining customers of licensing Merwin to JOA should be considerably greater than the adverse economic impacts on JOA's customers of relicensing Merwin to PP&L.

The Initial Decision states correctly, at 39, that the increasing concentration of the benefits of hydro-electric power is a consequence of congressional policy. But we do not agree that it is "the inevitable" consequence. We have a responsibility under the FPA to form a collective judgment as to what licensing action, including the selection of a licensee, will best serve the public interest, and to fashion that licensing action to accomplish that purpose. The congressional policy embedded in the statutes administered by the BPA and this Commission naturally enter into our consideration. In this instance, we have determined that the public interest strongly favors issuance of the new license to PP&L, and we have conditioned the license accordingly.

Anticompetitive Considerations

The Supreme Court said in *Federal Power Commission v. Conway Corp.*, 426 U.S. 271 (1976), at 279 (reasserting and enlarging upon an earlier statement in *Gulf States Utilities Corp. v. Federal Power Commission*, 411 U.S. 747 (1973), at 758-9),

The exercise by the Commission of powers otherwise within its jurisdiction "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of reg-

ulated aspects of interstate utility operations. . . ."

And the Commission has conceded on several occasions that anti-competitive considerations are relevant to its decisions to grant, withhold or condition water power licenses. See *Pacific Gas and Electric Company*, Project Nos. 2735 and 1988, 55 FPC 1543 (1976), at 1550-1, and *Municipal Electric Association of Massachusetts v. Federal Power Commission*, 414 F.2d 1206 (D.C. Cir., 1969), at 1209.⁵⁸

In *Northern Natural Gas Company v. Federal Power Commission*, 399 F.2d 953 (D.C. Cir., 1968), the District of Columbia Circuit examined the relationship between regulatory agencies and the antitrust laws to determine the required extent of the Commission's consideration of those laws, stating, at 959,

that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. . . . This analysis suggests that the two forms of economic regulation complement each other.

Calling its analysis the "theory of complimentary regulation", the District of Columbia Circuit added, at 960-1,

This is not to suggest, however, that regulatory agencies have jurisdiction to determine violations of the antitrust law. [Citations omitted.] Nor are the agencies strictly bound by the dic-

⁵⁸ Every hydro-electric license is issued on the condition, as specified in Section 10(h),

That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

tates of these laws, for they can and do approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance. [Footnote omitted.] In short, the antitrust laws are merely another tool which a regulatory agency employs to a greater or lesser degree to give "understandable content to the broad statutory concept of the 'public interest.'" *F.M.C. v. Aktiebolaget Svenska Amerika Linien*, [390 U.S. 238, 88 S.Ct. 1005 (1968)] 390 U.S. at 244, 88 S.Ct. at 1009.

In the light of the foregoing authorities, we naturally agree with PP&L that the Commission is obliged to take into account the public policies underlying the nation's antitrust laws. But taking them into account does not *require* the Merwin hydro-electric development to be relicensed to PP&L to avoid the concentration of hydro-electric power in the hands of public bodies, or to avoid increasing PP&L's commercial and industrial rates. The Commission's obligation is to weigh PP&L's substantiated anticompetitive claims, together with all other relative factors, in exercising its judgment in the public interest.

We concur generally with the Initial Decision, at 36-38, to the effect that there has been no showing that the issuance of a new license to JOA would somehow violate the antitrust laws. But, as the District of Columbia Circuit indicated in *Northern Natural*, the Commission does not have authority to determine such violations. The showing that is relevant is that the issuance of a new license to one applicant or the other would violate the *policies underlying* the antitrust laws, in which case the Commission is obligated, as indicated, to weigh in the public interest any substantiated claims together with all other relevant considerations. In speaking of "*other economic, social and political considerations*" [emphasis added], the District of Columbia Circuit highlighted the fact that anticompetitive

considerations are a type of economic implication which, as already decided, must be considered under the public interest standard of Sections 7(a) and 10(a).

Although anticompetitive considerations are relevant, we agree with the Initial Decision, at 37, that PP&L has not made a proper showing in this instance. Exhibit E-52 indicates that PP&L's average revenues per kilowatt-hour are higher than Clark or Cowlitz PUD's average revenues—which permits PP&L to argue that the issuance of the license to JOA would increase its (PP&L's) costs and hence its rates, and lessen competition by increasing its rate differentials with others. But we are unable to find in the record evidence of current rate differentials, if any, in the one geographic area of direct competition—the Clark County, Washington, Portland, Oregon, vicinity.⁵⁹ Considering that PP&L operates in six states and, therefore, has a number of direct competitors other than Clark PUD, it was incumbent upon PP&L to introduce evidence of current comparative rates (its own rates and its competitors' rates) as a foundation for further evidence that issuance of the new license to JOA would exacerbate the existing rate differentials.

The Records of Incumbents and Applicants

PP&L claims that its record as a licensee has been exemplary, and that it has been a model corporate citizen. And, apparently, it has no critics. PP&L calls attention to the flood control plan, *infra*, that it developed at the requires to the City of Woodland. Without compulsion, PP&L organized a recreational department that developed facilities at the Lewis River and other developments, receiving national recognition. It engaged voluntarily in a five-year study of the fishery needs of the Lewis River,

⁵⁹ The record indicates at Tr. 704 that PP&L's Oregon industrial rates were 113% to 243% higher than Clark PUD's industrial rates in 1970. That evidence is too stale for this proceeding.

and undertook various measures to improve the fishery. And it volunteered 4,767 acres of non-project lands for a wildlife program.

JOA, as the challenging applicant, hasn't had an equal opportunity to perform, but naturally promises that it will do as well as PP&L. Its constituent, Cowlitz PUD, is the incumbent licensee of Swift No. 2; but since that is a run-of-the-river hydro-electric development (and, in any event, is operated by PP&L), Cowlitz PUD hasn't been in a position to provide flood control, recreational facilities, and fish and wildlife habitats. Considering that every incumbent licensee or its predecessor was, at one time, an applicant without a "track record", we have no reason to doubt that JOA, which is a public body, would become as good a corporate citizen, and as exemplary a licensee, as PP&L has been.

We commend PP&L and JOA for conducting this adversary relicensing proceeding on a high level, without attempting to blemish one another unfairly. Although we find it difficult to balance PP&L's good operating record against JOA's lack of such a record, we have concluded that PP&L's demonstrated performance is more convincing than JOA's promises.

NPPC Fish and Wildlife Program

Pursuant to Section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (P.L. 96-501), the Northwest Power Planning Council (NPPC) developed in 1982 a fish and wildlife program to protect, mitigate, and enhance fish and wildlife resources in the Pacific Northwest. The project does not appear to conflict with NPPC's fish and wildlife program. Nevertheless, Article 56 reserves in the Commission the authority to order, where practicable, alterations in project structures and operations in order to take into account NPPC's fish and wildlife program.

OTHER MATTERS

The American Paper Institute Filings

On August 22, 1983, the American Paper Institute, Inc. (API) filed a motion pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR § 385.214) for leave to intervene out of time and for a stay of further proceedings herein, and a separate petition pursuant to Rule 207 (18 CFR § 385.207) to initiate a generic rulemaking proceeding to declare criteria (and the relative weights) to be applied to the selection of licensees in adversary relicensing proceedings. API states that it is a non-profit national trade association for the manufacturers of 90 per cent of the nation's pulp, paper and paperboard, a significant number of which own and operate hydroelectric developments that are licensed under the FPA. On September 7, 1983, JOA filed a reply in opposition.

API asserts that the time limitation for intervention should be waived

because when this proceeding was commenced neither API members nor other persons interested in future relicensing of projects was put on notice that rules of general applicability might be developed in the course of determining a dispute between the conflicting applicants in this proceeding. Recent developments have made API members aware that a determination of the present dispute without the benefit of the views of parties interested in the legal issues involved might result in determinations having broader applicability than intended.

The only "development" cited by API was the Supreme Court's denial of the petitions for a writ of certiorari to review the Eleventh Circuit's affirmance of the Commission's erroneous *Bountiful* decision.

API does not claim to have a direct financial interest in the outcome of this proceeding on its own behalf or as the representative of one or more of its members. Having no such interest, API states that it wants to intervene and cause this proceeding to be stayed because it.

believes that a more efficient utilization of the Commission's resources would result if the Commission instituted a generic rulemaking proceeding to determine the appropriate criteria to be applied in all relicensing proceedings when a competing applicant seeks to displace an original licensee.

Alternatively, API asks that the proceeding be reopened so that the legal issues and criteria can be considered "in depth and with a more complete record", including API's active participation.

Although we understand API's indirect interest in this proceeding, the motion for leave to intervene and for a stay of further proceedings herein will be denied because API does not have or represent an interest that may be directly affected by the outcome, and because it has not shown good cause for waiver of the time limitation for intervention. Since API is aware of the Commission's *Bountiful* decision, and that decision indicates clearly (Op. 88, at 8, n. 12) that adversary applications had been filed for relicensing the Merwin hydro-electric development, API should have known that this adversary relicensing proceeding, which was the first one to be tried after the declaratory *Bountiful* decision, would probably result in a decision that would be considered at a later time to have established a precedent. On the other hand, no "rules of general applicability" have been developed herein, other than the precedential value of the decision.

The petition to initiate a generic rulemaking proceeding is being denied because relatively few of the many licensings under the FWPA and FPA have been contested,

and, therefore, we chose for the time being to proceed on a case by case basis. A rule on relicensing criteria and their weights probably would be inappropriate until experience is acquired as to the kinds of issues that are raised, and their disposition by the Commission and the courts.

The Pacific Power & Light Company Filing

On August 24, 1983, PP&L filed a motion, which has not been opposed, to admit into the record the following documents:

Exhibit E-94: A photocopy of a document entitled "Contract By and Between Pacific Power & Light Company and Federal Emergency Management Agency," dated August 18, 1983, consisting of 13 pages including the signature page.

Exhibit E-95: A document, the first page of which bears the page number "19" and a section heading as follows: "3.3 Procedure for Regulation of High Inflow", and the last page of which is numbered "33", including an attached Plate IV entitled "Mudflow Control Storage."

Exhibit E-94 is a contract under which PP&L has agreed to operate the Merwin, Yale and Swift hydro-electric developments in a manner to provide 70,000 acre-feet of flood control storage from November 1 through April 1 each year, for the City of Woodland, Washington, on the Lewis River below the Merwin dam, and thereby enable Woodland to expand its residential areas. The exhibit is substantially the same as, and supersedes, an earlier draft that had been provided to everyone concerned in this proceeding, and is being submitted for the record pursuant to PP&L's commitment to do so when the final contract was signed.

Exhibit E-95 consists of the provisions in PP&L's Standard Operating Procedure Manual, referred to on pages 4

and 6 of Exhibit E-94, which develop the detailed regulation requirements during periods of high flow.

Since there is no opposition, Exhibits E-94 and E-95 will be admitted into the record.

As recommended by PP&L (Ex. T-8, at 22), Article 43 incorporates the substance of the flood control terms of Exhibit E-94 as a condition of the new license. But, since PP&L also committed its Yale and Swift hydro-electric developments to the flood control plan, and since flood control at Merwin would result in "excessive" power losses without Yale and Swift (PP&L's brief on exceptions, at 2), Article 54 requires PP&L to amend its licenses for Yale and Swift to include conditions that are identical to Article 43. As required by Section 10(a), Article 54 is necessary, in the judgment of the Commission, to assure that the project adopted will be best adapted to a comprehensive plan for beneficial public uses of the Lewis River. See *Georgia Power Company*, Project No. 485, 3 FERC ¶61,039, at 61,094.⁶⁰

Further Adversary Relicensing Considerations

The Initial Decision herein sought to apply the generalizations in the *Bountiful* decision (Op. 88, at 56-62) pertaining to the Commission's "public interest" determinations in adversary relicensing proceedings. Having decided the first such proceeding to apply those generalizations, and having rejected a formal rulemaking proceeding to establish criteria for selecting licensees in such proceedings, we will enlarge upon the existing generalizations here, to establish such criteria for the evaluation of "public interest" considerations in future adversary relicensing proceedings.

⁶⁰ For the same reason, Article 54 also includes the agreement between PP&L and the Washington Departments of Fish and Game embodied in Article 51, and the need to coordinate the operation of the three developments (Article 44) raised by PP&L (I.D., at 43).

First, the financial or economic impacts associated with the allocation of the benefits of the particular water resources to the customers of the one applicant or the other, are appropriately separable into short- and long-term effects, and should be so presented. Forecasted system costs, including those of the hydro-electric development being relicensed, should be compared over the short and long terms with the same costs, excluding those of that development and substituting the least expensive alternative resource that achieves comparable system reliability. Long-term impacts ordinarily should be limited in time to the anticipated term of the new license, but may include more than one time frame if the anticipated term is uncertain. Of particular importance, comparisons should be sharpened through presentations that address the same time frames and employ the same or similar analysis methods, which appropriately account for the time value of money.

Second, the goal of economic efficiency is enhanced by assigning hydropower to its highest-value use, which should be tested through (1) incremental cost and (2) rate impact presentations for the adversary applicants' systems for the short and long terms. The rate impact presentations should include parallel competitive impacts in identified retail and wholesale markets.

Third, the engineering efficiency of operating the hydro-electric development being relicensed in coordination with other such developments on the same waterway or waterways, and the adversary applicants' generating systems, should be tested through appropriate presentations that may include forecasts of heat rates, fuel consumption, reserves and other matters. The past performance of the incumbent licensee and any potential impediments for a new licensee would be relevant factors.

Fourth, the comparative equities of distributing the benefits of the particular water resources among the customers, owners or other stakeholders of one applicant or

the other should be appropriately presented. One possible surrogate measure of benefits and burdens would be impacts on the relative prices of electricity.

And fifth, the allocation of the benefits of the particular water resources to the customers of the one applicant or the other should be tested for consistency with (1) specific national energy policies, which should be identified, and (2) the FPA objective of maximizing the beneficial public uses of the particular waterway or waterways through projects that are "best" adapted to such uses.

We recognize, of course, that the relevance and importance of particular considerations will vary from case to case, just as the competing applicants must recognize that the ultimate balance is a matter for the Commission's judgment.

The Commission further finds and declares:

(1) Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 15 (deleting from paragraph 15 the words "attached as Exhibits J and M to the application in No. 2791") of the Ultimate Findings and Conclusions of the Initial Decision issued herein on April 28, 1983, are hereby adopted as findings and conclusions of the Commission.

(2) Paragraphs 13, 14 and 16 of the said Ultimate Findings and Conclusions, and Appendices C and D of the said Initial Decision, are rendered moot by the Commission's action herein.

(3) The plans of Pacific Power & Light Company in Project No. 935 are better adapted than the plans of Clark-Cowlitz Joint Operating Agency in Project No. 2791, and are best adapted, to develop, conserve and utilize in the public interest the water resources of the region. Furthermore, the Commission is satisfied as to the ability of Pacific Power & Light Company to carry out such plans and, therefore, the new license for the Merwin hydro-elec-

tric development should be issued to Pacific Power & Light Company, as hereinbelow provided.

(4) The preference of Section 7(a) of the Federal Power Act favoring States and municipalities over citizens, associations of citizens, and corporations, is applicable to all relicensing proceedings, other than those in which licensees in possession of project works are applicants, in which States or municipalities, and citizens, associations of citizens, or corporations, request successor licenses for the same water resources.

The Commission orders:

(A) The Commission's Opinion No. 88 issued June 27, 1980, and Opinion No. 88-A denying rehearing, issued August 21, 1980, are hereby overruled insofar as they find and declare, contrary to Paragraph (4) of the foregoing findings and declarations, that the said preference is applicable to all relicensing proceedings in which States or municipalities, and citizens, associations of citizens, or corporations, request successor licenses for the same water resources.

(B) The Initial Decision of the administrative law judge issued April 28, 1983, is hereby reversed, and the new license for the Merwin hydro-electric development is issued to Pacific Power & Light Company as hereinbelow provided.

(C) This new license is issued to Pacific Power & Light Company (Licensee) pursuant to Part I of the Federal Power Act (Act), for a period effective the first day of the month in which this license is issued, and terminating December 11, 2009, for the continued operation and maintenance of Merwin Project No. 935, occupying navigable waters and lands of the United States, on the Lewis River in Clark and Cowlitz Counties, Washington, subject to the terms and conditions of the Act, which Act is incorporated by reference as part of this license, and subject to such

rules and regulations as the Commission issues under the provisions of the Act.

(D) Project No. 935 consists of:

(1) All lands, the use and occupancy of which are necessary or appropriate for the purposes of the project, constituting the project area and enclosed by the project boundary, the project area and boundary being shown and described by certain exhibits which form part of the application for license and which are designated and described as:

<u>EXHIBIT</u>	<u>FPC No. 935</u>	<u>SHOWING</u>
J-1	87	General Map
J-2	88	General Map
K-1	89	Detail Map
K-2	90	Detail Map
K-3	91	Detail Map
K-4	92	Detail Map
K-5	93	Detail Map
K-6	94	Detail Map
K-7	95	Detail Map
K-8	96	Detail Map
K-9	97	Detail Map
K-10	98	Detail Map
K-11	99	Detail Map
K-12	100	Detail Map
K-13	101	Detail Map
K-14	102	Detail Map
K-15	103	Detail Map
K-16	104	Detail Map

(2) Project works consisting of:

- (a) A concrete arch dam, 313 feet high above its foundation, having an arch length of 728 feet and total crest of 1,250 feet, with four taintor gates 39 feet wide and 30 feet high and one taintor gate 10 feet wide and 30 feet high;

- (b) A 4,040-acre reservoir, 14.5 miles long, with a gross storage capacity of 422,800 acre-feet and a total usable storage capacity of 264,000 acre-feet between normal maximum water surface elevation 239.6 feet and minimum water service elevation 165.0 feet;
- (c) Four penstocks 15.5 feet in diameter located within the dam; three are 150 feet long and presently in use and each contains a 17-foot diameter butterfly valve located at the downstream face of the dam; the fourth penstock is available for future extension and use;
- (d) A powerhouse, semi-outdoor type, constructed of concrete, and containing three units each connected to a vertical-shaft reaction turbine rated at 61,500 hp and a semi-outdoor, umbrella type generator rated at 45,000 kW. The powerhouse also contains a 1,000 kW station service generator, bringing the total rated capacity to 136,000 kW;
- (e) Nine single-phase 13.8/115 kV transformers;
- (f) Three approximately 900-foot-long, 115 kV transmission lines terminating at the Merwin Substation bus;
- (g) Two recreational facilities on the Merwin Reservoir, Merwin Park and Speelyai Bay Park;
- (h) Fish facilities consisting of fish collection and trapping equipment at Merwin powerhouse and fish hauling equipment;
- (i) and all other facilities and interests appurtenant to the operation of the project, which are generally shown and described by the following exhibits:

<u>EXHIBIT</u>	<u>FPC NO. 935-</u>	<u>SHOWING</u>
L-1	105	General Plan & Sections
L-2	106	Powerhouse Plan & Section
L-3	107	Spillway Plan & Sections

L-4	108	Non Overflow Section & Thrust Block Elevations & Sections
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Exhibit M—Consisting of two pages of text entitled “Description of Equipment.”

Exhibit R—Consisting of thirty-two pages of text (with photographs) entitled “Recreation”; four appended permits designated Appendix A (six pages plus Exhibits A and B), Appendix B (eight pages plus Exhibit A), Appendix C (four pages) and Appendix D (two pages plus the related application, supervisor’s report and Exhibit A); and the following exhibits:

<u>EXHIBIT</u>	<u>FPC NO. 935-</u>	<u>SHOWING</u>
R-1	109	Recreation Plan
R-2	110	Recreation Plan
R-3	111	Lake Merwin Park Recreation Plan
R-4	112	Woodland Park Recreation Plan
R-5	113	Speelyai Bay Park Recreation Plan

Also consisting of revised pages 30 and 31, and a proposed sit development plan for Crescent Bay designated Appendix E (nine pages).

(3) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection with the project, located within or outside the project boundary, as approved by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(E) Exhibits J,K,L,M, and R, designated in Ordering Paragraph (D) above, are approved and made a part of the license.

(F) This license is also subject to the terms and conditions set forth in Form L-5 (Revised October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters and Lands of the United States," which terms and conditions designated as Articles 1 through 37, published at 54 F.P.C. 1832, are incorporated herein by reference and made a part hereof, and subject to the following special conditions set forth herein as additional articles:

Article 38. Prior to commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the State Historic Preservation Officer (SHPO) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount for such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with SHPO to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 39. The Licensee shall consult and cooperate with the U.S. Fish and Wildlife Service, the Washington State Departments of Game, Ecology and Fisheries, the U.S. National Marine Fisheries Service, and the National Park Service of the Department of the Interior, and other appropriate agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in

the project works or operations that may be necessary to protect and enhance those resources and values.

Article 40. The Licensee shall pay the United States the following annual charges, effective the first day of the month in which this license is issued:

- (a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 182,000 horsepower.
- (b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 138.18 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 41. In cooperation with the Washington State Department of Ecology, and in compliance with federal, state, and local regulations, the Licensee shall plan and provide for the collection, storage, and disposal of solid wastes generated through public use of project lands and waters, and, within one year from the date of issuance of this order, shall file with the Commission a solid waste management plan that has been approved by the Washington State Department of Ecology. This plan shall include: (a) the location of solid waste receptacles to be provided at public use areas, including campgrounds, picnicking areas, and similar areas; (b) schedules for collection from those receptacles; (c) provisions for including in the plan any additional public use areas as they are developed; and (d) the locations of disposal sites and methods of disposal.

Articles 42. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant per-

mission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it

grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting permission for the construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kv or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location

of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least seventy-five feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than fifty total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least forty-five days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identify of any Federal or State agency official consulted, and any federal or State approvals required for the proposed use. Unless the Director, within forty-five days from the filing date, requires the Licensee to file an application for prior

approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude the land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 43. The Licensee shall provide not less than 70,000 acre-feet of storage space in the Merwin, Yale and Swift hydro-electric developments for flood control on the Lewis River, beginning withdrawal by September 20 and reaching no less than 70,000 acre-feet by November 1 of each year, and retaining such space through April 1 and permitting gradual filling by April 30 of the following year, according to the following schedule:

DATE	MINIMUM STORAGE SPACE (ACRE-FEET)
September 20	0
October 10	35,000
November 1-April 1	70,000
April 15	35,000
April 30	0

Periodically, the Licensee shall review the Standard Operating Procedure Manual (Lewis River Projects—High Runoff Operation) with the Corps of Engineers and shall revise Section 3.3 thereof or the procedures of said section when deemed necessary by the Licensee and the Corps of

Engineers, and shall promptly file any such changes with the Commission.

Article 44. The Licensee shall coordinate the hydraulic and electrical operations of the Merwin, Yale, Swift No. 1 and Swift No. 2 hydro-electric projects so as to maximize the total production of electrical capacity and energy from all of the Lewis River hydro-electric plants while meeting the obligations of the Licensee for flood control and other beneficial public uses.

Article 45. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within 180 days from the date of issuance of this license, a Probable Maximum Precipitation (PMP) study for the Lewis River at Merwin Dam. The study shall incorporate the estimates of PMP as appropriate from the U.S. Weather Bureau Hydrometeorological Report No. 43. The study as submitted shall include sufficient data to permit an independent evaluation of all assumptions and parameters including, but not limited to: PMP values and precipitation losses and excesses for each sub-area of the watershed in the controlling PMP and its accompanying sequential storm; calibration of the runoff and stream course models with historic floods; the reservoir levels at the beginning of the PMP inflow and the reservoir rule curve and operation manual followed in routing the PMP.

Article 46. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within eighteen months from the date of issuance of this license, a structural evaluation of the arch, thrust block, spillway, and non-overflow sections of Merwin Dam under normal operating, Probable Maximum Flood and Maximum Credible Earthquake loading conditions. The study as submitted shall include all parameters, assumptions, and physical properties used in the analysis in order to permit an independent evaluation by FERC staff.

Article 47. The Licensee shall provide recreational facilities, in accordance with Exhibit R of the Application for Relicense, for optimum public utilization of the project recreational resources. In developing, modifying or abandoning recreational facilities and management policies relating to recreation, the Licensee shall consult with the National Park Service of the Department of the Interior, the Washington Interagency Committee for Outdoor Recreation, the Washington State Parks and Recreation Commission and other appropriate federal, state and local government agencies, and entities.

Article 48. The Licensee shall carry out the Wildlife Habitat Management Plan set forth in Exhibit E-18 of the hearing record on relicense, as the plan may from time to time be amended, modified or expanded by agreement among the Licensee, the U.S. Fish and Wildlife Service and the Washington Department of Game.

Article 49. For the purpose of maintenance and enhancement of the native fall chinook run downstream of Merwin Dam, the Merwin Project will be operated to provide regulation of discharges from the Lewis River system of reservoirs and plants as follows:

Part I. December 8 to March 1

- A. Minimum flow of 1,500 cfs will be maintained.
- B. Merwin power plant may be loaded at a rate that will cause the water to rise gradually but will not exceed one foot per hour as measured at the USGS Ariel gage located about one-half mile below the Merwin powerhouse. Unloading the Merwin power plant will be gradual but will not exceed one and one-half feet per hour stage change at the Ariel gage.

Part II. March 1 through May 31 (refilling period)

- A. When the March 1 forecast indicates the runoff volume at Merwin during March, April and May

will be equal to or more than 460,000 DSF, then the minimum flow will be 2,700 cfs. If the March 1 forecast is for a total runoff of less than 460,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 460,000 DSF and a minimum flow of 1,000 cfs if the volume runoff forecast is for 340,000 DSF. At no time will the minimum flow below Merwin be less than 1,000 cfs in March.

B. When the April 1 forecast indicates the runoff volume at Merwin during April and May will be equal to or more than 340,000 DSF, then the minimum flow will be 2,700 cfs. If the April 1 forecast is for a total runoff of less than 340,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 340,000 DSF and a minimum flow of 1,300 cfs if the volume runoff forecast is for 270,000 DSF. At no time will the minimum flow below Merwin be less than 1,300 cfs in April.

C. When the May 1 forecast indicates the runoff volume at Merwin during May will be equal to or more than 175,000 DSF, then the minimum flow will be 2,700 cfs. If the May 1 forecast is for a total runoff of less than 175,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 175,000 DSF and a minimum flow of 1,650 cfs if the volume runoff forecast is for 145,000 DSF. At no time will the minimum flow below Merwin be less than 1,650 cfs in May.

Part III. June and July Operation

During these months a minimum flow at Merwin of 2,500 cfs for June, 2,000 cfs from July 1-15

and 1,500 cfs from July 16-31, will be maintained as long as natural flow at Merwin is equal to or greater than 2,000 cfs in June, 1,600 cfs from July 1-15, and 1,400 cfs from July 16-31. When the natural flow is less than these amounts, the minimum flow at Merwin will be equal to the natural flow, except that at no time will the minimum flow be less than 1,650 cfs in June and 1,200 cfs in July.

Part IV. Plateau Operation (March 1-July 31)

- A. The period of plateau operation may be modified if the need (abundance of fish) so indicates, as determined jointly by the Washington Departments of Fisheries and Game and the Merwin licensee.
- B. Daily fluctuation in flows below Merwin will be restricted by providing flow plateaus (periods of near-steady discharge). Each plateau will be of as long a duration as possible when in effect, but flow plateaus can be changed as a result of changes in natural flow or power demand on the Lewis River power system. Reductions in the number of generating units on the line during the period of plateau operation will be held to as few as possible, with a target level of no more than twelve during this period.
- C. In changing a flow plateau on the rising stage, the Merwin plant may be loaded to provide a gradual rise as measured at the USGS gage of not more than one (1) foot per hour. On the falling stage the following limitations prevail: (a) for plateau operation of flows above 6,000 cfs the fall should be at a gradual rate of not more than 750 cfs per hour; (b) for plateau operation above 3,000 cfs but less than 6,000 cfs the fall should be at a gradual rate of not more than 500 cfs per hour;

(c) for plateau operation for flows below 3,000 cfs the fall should be at a gradual rate not to exceed 300 cfs per hour, and limited to only one change in any 24-hour period.

Part V. August 1 through October 15

- A. Minimum flow of 1,200 cfs will be maintained.
- B. Same as "B" of Part I.

Part VI. October 16 through December 7

- A. During the period October 16 through October 31, the minimum flow will be 2,700 cfs.
- B. During the period November 1 through November 15, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 4,200 cfs.
- C. During the period November 16 through December 7, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 5,400 cfs.
- D. The minimum flow requirements of Part VI.C. will be terminated at an earlier date by the Washington Department of Fisheries if salmon spawning or other conditions so warrant, and if such termination is requested by the Merwin licensee.
- E. Same as "B" of Part I.

Part VII.

- A. As used herein, the term "natural flow" shall mean, on any day, the average of the natural flow of the Lewis River at Merwin during an immediately preceding three-day period.
- B. It is expected that from time to time temporary modification of the above regulations may be warranted. Such changes would be made if mutually

agreed to by the Licensee, the State of Washington Departments of Fisheries and Game and the National Marine Fisheries Service.

- C. Biological and in-stream flow studies necessary to determine the flow requirements of the Lewis River for the enhancement of the fishery resource below Merwin Dam are incomplete as of November 1982. When such studies are complete, or by December 31, 1984, this Article shall be reviewed by the Washington Departments of Fisheries and Game together with the Licensee to determine whether or not any modification should be made to the flow regulation below Merwin in the interest of more closely matching such flow regulation to the respective needs of the fishery resource, recreation and power.

Article 50. The Licensee shall make the following provisions for anadromous fish other than fall Chinook:

Spring Chinook Salmon: The Licensee shall pay all expenses for the annual hatchery production of approximately 250,000 juvenile spring Chinook (to produce 12,800 adult fish). This production will take place in existing hatcheries.

Coho Salmon: The Licensee shall pay all expenses for the annual hatchery production of approximately 2,100,000 juveniles (to produce 71,000 adult fish). This production will take place in existing hatcheries.

Steelhead and Sea-run Cutthroat Trout: The Licensee shall construct and pay all operating and maintenance expenses of a hatchery to produce annually approximately 250,000 juvenile steelhead (about 41,600 pounds) and

approximately 25,000 juvenile sea-run cut-throat trout (up to 6,250 pounds).

Article 51. The Licensee shall provide, and shall pay costs of operation and maintenance of, such facilities that must be provided or modified to provide for the following resident fisheries:

Merwin: Annual release of 150,000 juvenile coho salmon at 50 fish per pound and 150,000 juvenile coho salmon at 20 fish per pound.

Yale: Protection of habitat on that portion of Cougar Creek under control of the licensee which provide spawning for resident sock-eye (Kokanee) salmon.

Swift: Annual release of 1,000,000 rainbow trout fry.

Article 52. The Licensee shall, if feasible, provide one additional small boat access below Merwin, and shall take over and maintain the two existing boat-launching facilities below Merwin. The Licensee shall secure three additional bank-fishing easements below Merwin.

Article 53. The Licensee shall continue negotiations with the Washington Department of Game on their request for one full-time fishery biologist and one full-time wildlife biologist to administer and monitor the programs under Articles 48, 51 and 52. If the parties have not reached an agreement within one year from the effective date of the license, the matter shall be referred by the Licensee to the Commission for decision.

Article 54. The Licensee shall file applications promptly to amend its licenses for the Yale and Swift No. 1 hydro-electric projects to include conditions that are identical to Articles 43, 44 and 51 hereof.

Article 55. Pursuant to Section 10(d) of the Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One-half of the project surplus earnings, if any, accumulated under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points.).

Article No. 56. The Commission reserves the authority to order, upon its own motion or upon the recommendation of federal or state fish and wildlife agencies or affected Indian Tribes, alterations of project structures and operations to take into account to the fullest extent practicable at each relevant stage of the decisionmaking processes, the regional fish and wildlife program developed and amended pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

(G) The motion for oral argument filed by the Public Utility Commissioner of Oregon on July 5, 1983, is denied.

(H) The motion for leave to intervene out of time and for a stay of further proceedings herein, and the separate petition to initiate a generic rulemaking proceeding to declare criteria to be applied in adversary relicensing proceedings, filed by the American Paper Institute, Inc., on August 22, 1983, are denied.

(I) The motion to admit Exhibits E-94 and E-95 into the record, filed by Pacific Power & Light Company on August 24, 1983, is granted.

(J) All exceptions not granted are denied.

(K) This opinion and order will become final 30 days from the date of its issuance unless an application for rehearing is filed as provided in Section 313(a) of the Federal Power Act. The filing of such an application will not, of itself, operate as a stay of the effective date of the license issued herein. The failure of Pacific Power & Light Company to file an application for rehearing shall constitute its acceptance of the license issued herein for Project N. 935; and, in acknowledgement of such acceptance, including the terms and conditions of the license, the license shall be signed for Pacific Power & Light Company and returned to the Commission within 60 days from the date of issuance of this opinion and order.

By the Commission. Commissioner Sheldon concurred, in the result only, with a separate statement attached. Commissioner Hughes dissented in part and concurred in part with a separate statement attached.

Kenneth F. Plumb
/s/KENNETH F. PLUMB,
Secretary.

Pacific Power and Light Company Project No. 935-000
Clark-Cowlitz Joint Operating Agency Project No. 2791-
000

SHELDON, Commissioner *Concurring in the result only:*
(Issued October 6, 1983)

I concur in the result. But I dissent from the overruling of *Bountiful*. A separate statement will issue at a later date.

Georgiana H. Sheldon
/s/GEORGIANA H. SHELDON
Commissioner

September 22, 1983

HUGHES, COMMISSIONER,

dissenting in part, concurring in part:

(Issued October 6, 1983)

The municipal preference issue underlying this case has evoked the sharpest disagreement among the Commission during my tenure. Among the many ironies of this dichotomy are that it involves a condition unlikely to occur often, an issue we did not need not to address to resolve this case, and an outcome that was unanimous notwithstanding this disagreement.

Thus, I dissent from the reversal of *Bountiful*¹, the discussion up to page 32 of the Commission Opinion, and Ordering Paragraph A. I concur in the decision that Pacific Power & Light (PP&L) is the applicant whose plan is better adapted, the public interest test by which the better adapted plan was chosen in this case, and the standards set out for consideration in future cases.² The portions of the Commission opinion in which I concur are pages 32 to the end and Ordering Paragraphs B through K.

The divisive issue is the applicability of municipal preference on relicensing of a project in competition with an incumbent non-preference licensee. The interaction between Sections 7 and 15 of the Federal Power Act poses an elegant verbal conundrum with no completely satisfying resolution. *Bountiful* says preference operates in that competition; today's decision says it does not. Each decision supplies a lengthy exegesis of the statutory interpretation

¹ City of Bountiful, 11 FERC ¶ 61,337, reh. den., 12 FERC ¶ 61,179 (1980); *aff'd sub nom. Alabama Power Co. v. FERC*, 685 F. 2d 1311 (11th Cir. 1982); *cert den.*, ____ U.S. ____ (1983).

² I regard these standards as a more complete statement of the generalizations set out in *Bountiful* at 61,735-61,736. Similarly, the majority's discussion at pp. 46-59 in this case is within the analytical framework of these standards. I do not view them as new standards, and I believe we could have, and should have, applied them explicitly in this case.

and legislative history available to support the result. Both serve to make absolutely clear the inconclusiveness and ambiguity of those sources of wisdom. Both are subject to criticisms that they fail to provide for every possible situation, and that they rely on prior assumptions to reach artificial meanings. Both lead ultimately to logical vertigo.

Although today's Commission decision refers to the affirmance of *Bountiful* by the 11th Circuit and the denial of certiorari by the Supreme Court, it fails to mention the Commission's unusual stance of filing a petition for certiorari of the affirmance. It is hard for mere mortals to know whether, under that peculiar set of facts, this may not be a case where the denial of certiorari may mean more than it usually does. See *U.S. v. Kras*, 409 U.S. 434, 443 (1973) and Linzer, *The meaning of Certiorari Denials*, 79 Columbia L. Rev. 1227 (1979).

Given this recent judicial history, whose binding quality is, in keeping with the underlying issue, in doubt, I find it utterly unnecessary for the Commission to reopen the question in order to decide this case *unless* we adopt the administrative law judge's finding that the two competing applications are equally well adapted to serve the public interest. Since none of us believes that a tie exists, and since we all agree that evaluation of economic factors is appropriate, and that an economic evaluation in this case shows PP&L to be the superior applicant, it is not necessary to retread the ground of *Bountiful* to decide the competitive aspect of this case. Our reversal of *Bountiful* is tantamount to purposely hitting ourselves in the head with a mallet: it draws considerable attention but little respect.

The majority attempts to avoid the charge that overruling *Bountiful* is dictum by raising the opportunity of a municipality to make its plans equally well adapted, which is an adjunct of the municipal preference provision. Slip op. p.8. If *Bountiful* applies, the argument runs, then the

JOA should be allowed to revise its plans to match PP&L's. But, the majority's "alternative position", at Slip op. pp. 36-38, finds that the JOA had an appropriate opportunity to render its plans equally well adapted (see fn. 34) and implies also that the JOA's plan is incapable of being made as well adapted, except by so conditioning it as to make it meaningless. I fully agree that Congress did not intend to create a procedure to test an applicant's willingness to accept a completely pyrrhic victory. That case is the hypothetical described at pp. 32-35, and it appears hypothetical only in that these parties' names are not attached to the purported hypothetical facts.

Ordinarily, neither the correction of a prior error, if such it be, nor a shift of policy reflecting the Commission's changing membership would be a matter of such intense concern or opposition. On this issue, however, ride high political and economic sentiments. Here, we are dealing with a policy, whether wise or not, which had just been judicially sanctioned. That sanction, if coupled with a decision in this case applying that policy to these facts through a discussion of the factors discussed at pp.46-59 and 63-64, would have brought predictability and stability to our review of contested relicensing applications. Sadly, the parties to this case and others interested in these matters, both public and private, and their paying customers, will now be exposed to a new round of appellate review, with its attendant cost and risks.³

Only reluctantly do I suggest that we refrain from seeking what may indeed be the best view of a perplexing statutory question. But, it is also worth repeating Chief Justice Warren's observation:

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies

³ It is also likely that legislative attention, so badly needed in other areas, will be diverted to a re-examination of this subject.

immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other. [Footnote omitted]. CAB v. Delta Air Lines, 367 U.S. 316, 321 (1961).

In this matter, I would hold that the time for finality has arrived.

J David Hughes
/s/J DAVID HUGHES
Commissioner

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Pacific Power and Light Company)Project No. 935-000
)
Clark-Cowlitz Joint Operating Agency)Project No. 2791-000
)

INITIAL DECISION

April 28, 1983

APPEARANCES

Hugh Smith and Thomas H. Nelson for Pacific Power and Light Company

Christopher D. Williams, Robert L. McCarty, Charles T. Mertsching, George H. Williams Jr. and John F. Wynne for Clark-Cowlitz Joint Operating Agency

W. Benny Won for the Oregon Public Utility Commissioner

James M. Johnson for Washington Department of Fisheries and Washington Department of Game and Wildlife

Donald H. Clarke, Edward A. Finklea, Joseph V. Vasapoli, Alan Mitchnick, and Luis Konski for the Staff of the Federal Energy Regulatory Commission

LOTIS, Administrative Law Judge

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I. Introduction

This is a case of first impression. For the first time since passage of the Federal Water Power Act in 1920 (now Part 1 of the Federal Power Act), this Commission must decide after evidentiary hearing which of two competing applicants—one publicly-owned, one privately-owned—should be granted a license to operate a hydroelectric project after the expiration of the project's original fifty-year license term.

The project to be relicensed is the 136 megawatt (mw) Merwin Dam and related facilities located on the Lewis River in Clark and Cowlitz Counties, southwestern Washington (*see* Map Appendix A hereto).

The competing applications are Pacific Power & Light Company (PP&L), the present license holder, and the Clark-Cowlitz Joint Operating Agency (JOA), a municipality.

JOA's status as a municipality holds special significance, for it brings into play the following "preference" provision of Section 7(a) of the Federal Power Act:

In issuing . . . licenses . . . the Commission shall give preference to . . . municipalities, provided [their] plans . . . are deemed by the Commission equally well adapted, or shall within a reasonable

time be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

16 U.S.C. § 800(a).

In its *City of Bountiful* decision, Opinion No. 88, the Commission held that the municipal preference provision applied to all relicensing proceedings and that it operated as a tie-breaker in favor of the municipality if the municipal competitor's plans were found "equally well adapted" as those of the non-municipal competitor. *City of Bountiful, et al.*, Docket No. EL78-43, Opinion No. 88 issued June 27, 1980, 11 F.E.R.C. ¶ 61,337, *reh. denied*, Opinion No. 88-A issued August 21, 1980, 12 FERC ¶ 61,179, *aff'd Alabama Power Company v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *petitions for cert. filed*, February 4, 1983 (No. 82-1321 *et al.*).

This decision finds that the plans of JOA are equally well adapted as those of PP&L to conserve and utilize in the public interest the water resources of the region. JOA is therefore awarded the new license.

II. Background

A. Location of Merwin

The Merwin Hydroelectric Project (Merwin) is located on the Lewis River in Clark and Cowlitz Counties, southwestern Washington. It is situated on the western foothills of the Cascade Range. The Lewis River flows into the Columbia River about twenty-one miles downstream from Merwin. The Cities of Portland, Oregon and Vancouver, Washington are about thirty-five miles and twenty-seven miles southwest of Merwin, respectively. The communities nearest Merwin are the City of Woodland, Washington, twelve miles to the west and the cities of Kelso and Longview, Washington, twenty miles to the northwest. Mount St. Helens lies about twenty-five miles northeast of Merwin.

B. Description of the Merwin Project

Briefly, the Merwin Project facilities consist of the following:

- (1) the dam—a concrete arch 313 feet high and 728 feet long with a total crest of 1250 feet.
- (2) the reservoir—14.5 miles long with a surface area of 4,040 acres at maximum pool elevation
- (3) four steel penstocks
- (4) the powerhouse—contains three generating units and a station service generator with a total rated capacity of 136,000 kw
- (5) the switch yard
- (6) two recreational facilities—Merwin Park, built in 1934 and Speelyai Bay Park, built in 1960.
- (7) fish facilities—fish collection, trapping and hauling equipment

For a more detailed description of the Merwin project facilities see ordering paragraph B of this decision.

C. History of Merwin License

On December 12, 1929, the Federal Power Commission issued a fifty-year license to the Inland Power & Light Company, a wholly owned subsidiary of PP&L, for the Merwin (Ariel) hydroelectric project, designated FPC Project No. 935. The project's name originally Ariel, was changed to Merwin on May 1, 1948, in honor of L.T. Merwin, an official with PP&L and president of PP&L's affiliate, Northwestern Electric Company, from 1936 to 1947. Merwin was built between 1929 and 1931. It was placed in service on September 4, 1931, with one turbine generating unit. A second unit was installed in 1949 and a third in 1958, bringing the project to its present installed capacity of 136,000 kw. Inland was merged into PP&L in

1942 and the Merwin license was transferred to PP&L effective May 14, 1942. *In re Pacific Power & Light Co. and Inland Power Co.*, 2 F.P.C. 508 (1941). PP&L's license for Merwin expired on December 1, 1979. Since that time PP&L has continued to operate the project under successive annual licenses.

D. Other Hydroelectric Projects On The Lewis River Operated In Coordination With Merwin

Merwin is operated on a coordinated basis with three other licensed projects on the Lewis River—Yale, Swift No. 1 and Swift No. 2. Yale and Swift No. 1 are storage dams located 14.7 miles and 28.4 miles, respectively, upstream from Merwin. Both were licensed to PP&L for fifty years. Swift No. 2, a generating unit located at the upper end of the Yale reservoir, is licensed to Public Utility District No. 1 of Cowlitz County for fifty years. The draft tubes of Swift No. 1 powerhouse discharge into a canal which flows into the forebay of Swift No. 2. PP&L operates and maintains Swift No. 2 for Cowlitz and currently purchases the entire output from Cowlitz., Yale was licensed in 1951. Swift Nos. 1 and 2 were licensed in 1956. See *Pacific Power & Light Co.*, Project 2071, 10 F.P.C. 917 (1951); *Pacific Power & Light Co.*, Project No. 2111, 16 F.P.C. 1117, (1956); and *Public Utility District No. 1 of Cowlitz County, Wash.* Project No. 2213, 16 F.P.C. 1281 (1956).

E. Brief Description of the Competitors

1. PP&L

PP&L, a privately owned utility incorporated in 1910, is engaged primarily in the business of generating, purchasing, transmitting, distributing and selling electric power and energy to residential, commercial and industrial customers (Item A, p. 5). It serves 643,000 customers (Ex. E-52), eighty percent of which are in Washington, Oregon, Idaho and Montana, the remainder in California and Wyoming (Tr. 733). In its relicense application (Item A, p.

7), PP&L summarizes its power plant ownership as follows:

		Name Plate Rating (kw)
Hydro	33 plants	863,393
Steam	5 plants	2,450,202
Combustion Turbine	1 plant	23,800
Nuclear	<u>1 plant</u>	<u>30,400</u>
	40 plants	3,367,795

2. JOA

JOA was established pursuant to the laws of the State of Washington on August 17, 1976, for the purpose of making application to the Federal Energy Regulatory Commission for a new license to operate Merwin. JOA is composed of Public Utility District No. 1 of Clark County, Washington (Clark PUD), and Public Utility District No. 1 of Cowlitz County, Washington (Cowlitz PUD). These two Districts, which distribute power within their respective counties, have the Lewis River as a common boundary. Merwin, which lies astride the Lewis River, is thus located within the boundaries of both Districts.

Clark PUD began operations in 1943. It distributes electric power over its own system to approximately 83,000 customers in Clark County. Clark PUD does not have its own generation but, rather, purchases practically all its requirements from the Bonneville Power Administration (BPA) (Ex. T-17, pp. 2-3).

Cowlitz PUD began operating in 1939. It owns and operates an electric distribution system which serves about 36,000 customers in Cowlitz County (Ex. T-19, p. 9). Cowlitz PUD's requirements are met through BPA purchases as well as limited term entitlement power from Grant County PUD licensed projects at Priest Rapids and Wanapum and from the Columbia River Storage and Power Exchange. Cowlitz PUD also owns Swift No. 2 hydroelectric plant with a 70 mw capacity (Item E, Vol. A-V at iv).

A more detailed description of the operations of PP&L, JOA and Clark and Cowlitz PUDs is set forth in the following sections of this decision, particularly Section X, "Economic Impacts."

F. The Present Proceeding

In April 1976, PP&L filed its application for relicense of Merwin (Items A and B). JOA filed its competing application, designated Project No. 2791, in February 1977 (Item E).

By order issued October 18, 1978, the Commission consolidated the applications for joint disposition. The Commission order setting the matter for hearing was issued September 29, 1981. Intervention in this proceeding was sought by and granted to the following parties:

Public Service Commission of Wyoming
 Montana Public Service Commission
 The People of the State of California and the Public
 Utilities Commission of the State of California
 Washington Utilities and Transportation Commission
 Washington State Department of Game
 Washington State Department of Fisheries
 Washington State Department of Ecology
 Oregon Public Utility Commissioner, John J. Lobdell
 United States National Marine Fisheries Service City of
 Woodland, Washington

Hearing began November 5, 1981, with a prehearing conference. Following extensive discovery, evidence was presented by PP&L, JOA, staff, the Washington State Departments of Fisheries and Game, the Oregon Public Utility Commissioner and the City of Woodland. A hearing was held on August 3, 1982, in Vancouver, Washington, at which members of the public expressed their views on the competing applications. Opinion was divided as to whether JOA or PP&L should be the new licensee. The judge made an on-site inspection of the Merwin project on

August 4, 1982. Cross-examination of the evidence took place at the Commission's offices in Washington, D.C. from September 20, through October 4, 1982. Briefing was completed February 18, 1983.

Staff supports the issuance of a license to JOA. Staff made a comparative analysis of the the competing proposals, including economic impacts, and determined that JOA's plans are equally well adapted as PP&L's to conserve and utilize in the public interest the water resources of the region. The preference provision of Section 7(a) of the Act would, therefore, operate to award the license to JOA.

The Washington State Departments of Fisheries and Game (WFG) take no position as to which of the competing applicants should be granted the license. WFG presented evidence on the fish and wildlife measures which should be adopted if either PP&L or JOA is awarded the license.

The Oregon Public Utility Commissioner and the Public Utilities Commission of the State of California support PP&L. Both argue that the economic impacts of relicensing demonstrate that the broader public interest is served by retaining PP&L as licensee. The City of Woodland also favors reissuance of the license to PP&L.

III. The April 1982 Stipulations

Prior to trial, in April 1982, PP&L and JOA entered into stipulations (Tr. 229-233) reciting those matters on which they were in agreement. The parties are to be commended for their efforts. The stipulations appear in Appendix B to this decision. Its key provisions are set forth below.

A. JOA Status

JOA's status as a municipality within the meaning of Section 3(7) of the Act is not in dispute. Stipulation 1 provides that:

Clark-Cowlitz Joint Operating Agency (CCJOA) is a duly created and validly existing municipal corporation organized under the laws of the State of Washington by Public Utility District No. 1 of Clark County and Public Utility District No. 1 of Cowlitz County which provide electric service in Clark County and Cowlitz County, respectively.

B. Staffing And Workforce Necessary To Manage, Operate, Maintain And Carry Out The Responsibilities Of Project Ownership

Stipulation 6 provides that:

Pacific has and CCJOA either has or can acquire the necessary staff and work force to manage, operate, maintain and carry out all responsibilities of Project ownership.

The record bears out the accuracy of this stipulation.

PP&L's qualifications to discharge its responsibilities as licensee are spelled out by its witness, C.P. Davenport, Vice-President of PP&L (Ex. T-1). Davenport recounted PP&L's history as Merwin licensee and testified, in effect, that its record has been exemplary. With respect to the matter of PP&L's staff and work force, no party questions PP&L's ability to successfully operate the project.

JOA's witnesses in this area are Robert W. Gillette and Robert L. McKinney.

Gillette, an electrical engineer, was employed by Grant County Public Utility District for twenty-five years, the last ten years of which he served as its manager. Prior to and during the period Gillette was manager of the District, he had the responsibility of hiring all District personnel. He also served as Chairman of the Northwest Public Power Association in 1957, and was an organizing and charter member of the board of directors of the Elec-

tric Power Research Institute, known as EPRI, and a member of the board of the Western Systems Coordinating Council. He is presently employed by CH2M Hill, Inc., a consulting firm.

Gillette sees no difficulty for JOA in acquiring the personnel necessary to staff Merwin. He likens JOA's situation to that of any other new hydroelectric licensee. Gillette points to the present staffs of Clark and Cowlitz PUDs which have approximately 370 and 140 employees, respectively. These employees are assigned principally to electric distribution and transmission activities and many of their skills are transferable to hydroelectric operations. Both Districts also operate water distribution systems. Gillette estimates that if JOA had to acquire a totally new staff for Merwin, only sixteen people would be required. Gillette presented a list of the personnel, by job title, which would be required and testified in some detail as to the precise skills, functions and responsibilities of each position. In addition to being able to draw on present personnel of Clark and Cowlitz PUDs, Gillette testified that typically talented personnel could be found at other projects and the Bureau of Reclamation and the Corps of Engineers. He notes that in the three northwest states there are about twenty-nine plants larger than Merwin's 135 mw and 104 plants smaller than 135 mw. Gillette testified that in starting up Grant County PUD's Priest Rapids 788 mw Project in 1959, they were able to hire personnel from other projects and that they had no difficulty in building their hydroelectric force from no employees to 180. That staff then became a pool of talent from which Douglas County PUD drew to start up its Wells Hydroelectric Project. Gillette cites other instances of public utility districts developing their own staffs to operate projects. From Gillette's observation, the dispatchers presently operating at Clark PUD and Cowlitz PUD and especially at Cowlitz PUD are fully capable of di-

recting the type of scheduling activities that would be necessary at Merwin.

Cross-examination of Gillette was waived (Tr. 752).

JOA's witness McKinney provided testimony supporting the proposition that JOA would have little difficulty in managing, staffing and operating the Merwin project (Ex. T-25). McKinney has thirty-three years of engineering and management experience in the electric utility industry, the last eleven years as General Manager of Cowlitz PUD. His professional assignments have included: former trustee, North American Electric Reliability Council; member system representative, Western Systems Coordinating Council and past member of the executive committee of that council; member, Pacific Northwest Utilities Conference Policy Committee and its executive committee; and President-Elect and Director of the American Public Power Association.

McKinney testified that JOA would represent its member systems, Clark PUD and Cowlitz PUD, in the acquisition and financing of the plant and would have the responsibility to fulfill all license conditions. Actual management and operating responsibilities and authority would, by contractual arrangement, be placed in hands of Cowlitz PUD. This makes sense, McKinney explained, because the management and operational skills of Cowlitz PUD in carrying out its electric distribution and water utility business are similar to those necessary for Merwin. He also notes Cowlitz PUD's experience in managing the Swift No. 2 Project. McKinney testified that designating an individual entity as operator was not unusual and is, in fact, common in the Northwest and throughout the United States. Where divided ownership exists, the parties select and implement among a number of alternatives the operational arrangement which best meets the goal of cost effectiveness. McKinney cites as an example the Centralia California steam electric plant owned by both public and private util-

ities which is managed and operated by PP&L. He further notes that Swift No. 2 is being operated by PP&L pursuant to a contractual arrangement with Cowlitz PUD in conjunction with the other Lewis River projects. McKinney testified that while JOA was prepared to operate Merwin through Cowlitz PUD, JOA would consider a similar contractual arrangement with PP&L. As part of that contractual arrangement JOA would consider utilizing the present employees of PP&L. In terms of staffing, McKinney testified that there are no regular operators on duty at Swift Nos. 1 and 2, both being remotely controlled from equipment now at Merwin (Tr. 966-967).

McKinney points out that a number of utilities without generating experience have taken on the responsibility of hydroelectric generation and that he knows of no case where it has not been efficiently or effectively accomplished. McKinney offers as proof: Cowlitz PUD's case where, in 1959, the Federal Power Commission judged Cowlitz's ability sufficient to grant it a license for Swift No. 2; Grant County PUD qualified to be issued a license of Priest Rapids and Wanapum Developments; and much smaller districts, such as Pend Oreille County PUD and Douglas County, were selected as licensees of the Box Canyon and Well Projects, respectively.

Consistent with Stipulation 6, PP&L did not challenge JOA's ability to "acquire the necessary staff and work force to manage, operate, maintain and carry out all responsibilities of Project ownership."

C. Need For Merwin Power

Stipulation 7 provides that:

Both Pacific and CCJOA can use all the firm power output of the Project to meet their customers' loads and use or otherwise dispose of any surplus power which may from time to time be approved [sic] by the Project.

This stipulation speaks not only to PP&L's and JOA's customers' power requirements but perhaps more significantly to the relatively inexpensive cost of Merwin production which will allow both to displace more expensive supply sources.

D. Impact of Issuance of License on Existing Natural, Historic or Scenic Values on the Project

Stipulation 10 provides that:

Issuance of the license to Pacific or CCJOA will not impair existing natural, historic or scenic values in the Project area.

Evidence to the contrary has not been introduced.

E. Water Rights Incident to the Merwin Project

Stipulation 11 provides that:

Regardless of ownership, the water rights would either stay with Pacific or, after appropriate proceedings by the State of Washington, be transferred to the CCJOA depending upon the outcome of this relicensing proceeding.

The nature and extent of these water rights are described by PP&L in Item A, Exhibit E.

F. Project Safety

Stipulation 14 provides that:

The Project has been routinely inspected by FERC staff inspectors and by independent consulting engineers with the result that the Project continues to be in a safe and structurally sound condition. There is no evidence that the Project could not continue to operate in a safe and adequate manner for the next 50-year license period.

Staff witness Fargo recommended that additional studies be undertaken to insure that the Merwin Dam is safe

under current dam safety criteria (Ex. T-41, pp. 10-11). His concern is that the studies conducted in 1966 under Part 12 of the Commission's regulations did not address the stability of the structures under earthquake conditions, or the more recent U.S. Weather Bureau's Hydrometeorological Report No. 43 which incorporates estimates of probable maximum precipitation.

Neither PP&L nor JOA disputes the need for such studies. Counsel for PP&L advises that the FERC Regional Engineer in San Francisco has instructed PP&L to undertake the seismicity study and that the study would be undertaken once the parameters are established (Tr. 1074)

The license conditions recommended by Fargo appear reasonable and will be adopted and incorporated into the new license.

The violent explosion of May 18, 1980, at Mount St. Helen's blasted away the northern portion of the mountain and devastated more than 150 square miles, most of which is outside the Lewis River drainage basin (PP&L witness de Sousa, Ex. T-8 p. 16). Fortunately, there was no significant effect on the Yale or Merwin projects although mud flows discharged more than 11,000 acre-feet of water, sediment, and debris at the upper end of the Swift reservoir (*id.*). After the eruption, PP&L developed plans based on a board of consultants' recommendations to provide additional storage space at the Swift reservoir to contain volcanically derived mudflows (*id.* p. 17). That space can also be used for flood control if there is no indication of imminent volcanic activity at Mount St. Helen's, and certain other favorable conditions exist (*id.* p. 18).

G. Further Development or Expansion at Merwin

Stipulation 13 provides that:

Decisions by Pacific or CCJCA regarding any future expansion or new development in the

Lewis River Basin would be made in light of each utility's need for generation after considering the affect [sic] of the Northwest Power Pool, the Pacific Northwest Coordination Agreement and the Regional Act.

H. Coordination of the Lewis River Projects

Stipulation 12 provides that:

CCJOA is not presently a member of either the Northwest Power Pool or the Pacific Northwest Coordination Agreement. Cowlitz County PUD is, however, a member of the Pacific Northwest Coordination Agreement. Regardless of present affiliation, *CCJOA, or Cowlitz County PUD as the designated operating utility, would operate the Project* in the Northwest Power Pool under the Pacific Northwest Coordination Agreement *in coordination with other projects on the Lewis River* and in conformity with any operating conditions imposed by FERC or other applicable regulations. [Emphasis supplied.].

PP&L presently operates the Merwin, Swift and Yale reservoirs on a coordinated basis. JOA's ability to coordinate Merwin's operations with those of PP&L's upstream reservoirs Swift and Yale, as stipulated, rests with PP&L. All parties agree that coordination of the three projects is necessary to achieve maximum public benefits in the areas of power generation, flood control, flow maintenance for fish habitat and maintenance of the Merwin reservoir elevation for recreational uses. Evidence of this fact was attested to by every witness addressing the subject. See Testimony of PP&L witnesses de Sousa Ex. T-8, pp. 8, 10 and Wilson Ex. T-11, pp. 10, 18, 21, 22, 23-24, Ex. T-12, p. 6; JOA witnesses Mozer Ex. T-22, p. 10, Ex. T-23, pp. 3, 6-7, 9-14 and McKinney Ex. T-25, pp. 16-19; staff witness Fargo Ex. T-41, pp. 3, 5, 6-10. Coordination of the Lewis River projects, however, is impossible without

PP&L's cooperation. When PP&L agreed to Stipulation 12 in April 1982, PP&L, by implication, agreed to coordinate its operations with those of JOA, if JOA received the Merwin license. If PP&L had opposed coordinating its upstream projects with JOA in April 1982 it would have simply refused to enter into that stipulation.

PP&L offers no explanation to square its position in support of Stipulation 12 with its present position. PP&L now argues that JOA has not proved itself a qualified licensee because public benefits would be lost if *ownership* of the three presently coordinated Lewis River storage projects is severed (PP&L Reply Br. pp. 27-28). PP&L's witness Wilson testified as to the consequences if JOA owned Merwin and JOA and PP&L operated their respective projects *independent of one another, i.e.,* without coordinated operations (Ex. T-11).

The problem with Wilson's evidence is that JOA is willing to operate Merwin in coordination with the other Lewis River projects. JOA has made it abundantly clear through Stipulation 12, its evidence and its briefs that it is willing to undertake coordinated operations with PP&L in the interest of optimization of the beneficial public uses of the Lewis River. PP&L is, in effect, saying that JOA cannot be a qualified applicant unless it operates the projects on a coordinated basis, and to do that requires an agreement with PP&L—"an agreement Pacific is under no compulsion to make" (PP&L Initial Br. p. 27). PP&L says, "it would *not* be in the interest of Pacific and its ratepayers to cooperate" (emphasis in original, *id.* p. 28).

PP&L's position is fraught with difficulties. It must be remembered that PP&L does not own the water resources of either Merwin, Swift or, Yale; the people of the United States do. PP&L is a custodian of this public property with a license to use it, but only for a limited term. The basis for the issuance of any license is that the licensee would operate the project in a manner best adapted for

beneficial public uses (Section 10(a) of the Act). PP&L concedes that the problem of coordination arises "because these storages [Yale, Swift and Merwin reservoirs] must be managed together to produce the maximum public benefits" (Initial Br. p. 29). No party disputes this statement. If maximum public benefits result through coordinated operations such as presently being performed by PP&L under singled ownership, why should the public be deprived of these same benefits through multi-party ownership?

To accept PP&L's rationale would mean that multiple ownership of projects on the same river would be impossible to establish in relicensing proceedings without the consent of the project owner whose license was up for renewal. This would place the public interest in the hands of the licensee, not the Commission, and would conflict directly with the decision of the Congress to award fixed term licenses rather than to create the form of perpetual ownership which would result under PP&L's theory.

Further, no technical impediments to coordinated operations have been demonstrated. PP&L refers to problems of managing flood control by committee (Initial Br. p. 36). No party recommends such a committee. The details of a coordination agreement must await the issuance of a license and formal negotiations. A coordination arrangement between JOA and PP&L may be complex, but it is not beyond the capabilities of the parties to accomplish. Complex coordination arrangements are not unknown to those in the hydroelectric field and to this region of the country. The Pacific Northwest Coordination Agreement (Item D) is an arrangement for planned operation among five privately owned utilities, including PP&L, five public utility districts, three municipalities, an aluminum producer, BPA and the Corp of Engineers. Its basic concept is to insure joint cooperative actions among the participants to maximize utilization of the hydroelectric resources of the region.

PP&L and Cowlitz PUD already have some experience working together successfully in a complex cooperative undertaking. Both are parties to a settlement agreement whereby Cowlitz pays twenty-six percent of the cost of construction of Swift Nos. 1 and 2 projects in exchange for receiving twenty-six percent of the generation at those projects plus twenty-six percent of the generation at Yale and Merwin attributable to Swift No. 1 storage. To identify PP&L's and Cowlitz's rights to power under the settlement requires a complicated series of estimates which the parties have been able to master and live with (Ex. T-11, pp. 14-15).

JOA's witness Mozer suggests that JOA and PP&L could develop a multi-owner energy accounting system patterned after the Mid-Columbia Hourly Coordination Agreement. That agreement involves seven hydroplants, one owned by the Federal government and the remaining six belonging to non-federal owners, as well as eighteen power purchasers. PP&L argues that the Mid-Columbia agreement is not as complicated as that which would have to be negotiated for the Lewis River projects. JOA disagrees. Whether PP&L or JOA is correct as to the degree of complexity in a Lewis River coordination agreement *vis a vis* the Mid-Columbia Agreement is immaterial. Coordinated operation of the Lewis River projects remains in the public interest under either single or multiple ownership, and that interest cannot be defeated by any party's refusal to coordinate. PP&L having coordinated the operations of all three projects since Swift No. 1 went on line in 1956 cannot feign ignorance of the technical details necessary to accomplish coordination with JOA.

While PP&L may not be satisfied with specific suggestions offered by JOA's witnesses for coordinated operations; no witness or party attempted to present the details of a coordination agreement. This must necessarily await the award of the license with appropriate conditions de-

signed to allow the parties adequate opportunity to formulate an agreement prior to actual transfer of ownership.

PP&L's position on coordination has been murky throughout this proceeding. After signing Stipulation 12—which implies that PP&L would cooperate with JOA to achieve coordinated operations—PP&L's position becomes ambivalent. Counsel on brief says that "Pacific has at no time stated that it would refuse to cooperate" (Initial Br. p. 28). However, at the same time, counsel explains PP&L's position in these terms (*id.* p. 27):

If the JOA obtains Merwin, it is absolutely necessary that the JOA reach an agreement with Pacific for cooperative operation of the three storage projects if the existing public benefits are to continue, T-12 at 11, lines 12-16, an agreement Pacific is under no compulsion to make. This agreement is necessary because without it the JOA cannot meet the Section 10(a) conditions, and without it the Commission cannot license Merwin to the JOA. The JOA simply lacks the authority and rights which it must have. (Footnotes omitted).

In a footnote accompanying this passage PP&L says that, "Pacific, having just been robbed of a very valuable property, is not likely to be in a very amicable mood entering such negotiations." PP&L's witness Wilson testified that "... should the JOA take over Merwin, Pacific necessarily would operate its remaining projects to the best advantage of its remaining multipurpose obligations, which would detrimentally impact Merwin's operation" (Ex. T-11, p. 23). Wilson further testified that, "[t]his efficient operation [PP&L's present coordinated operations of the Lewis River projects] should not be jeopardized through a JOA takeover of Merwin, which would necessitate that the JOA achieve agreements with Pacific in order to continue to provide the full spectrum of benefits Pacific now routinely pro-

vides. Moreover, I do not know whether Pacific would have any interest or reason to enter such agreements" (Ex. T-12, p. 6).

PP&L's reluctance to enter into a coordinated operation with JOA surfaced again very recently. Prior to the filing of initial briefs, staff counsel, on January 10, 1983, filed on behalf of itself and the Washington Department of Game, Washington Department of Fisheries, JOA and PP&L, a stipulation providing for minimum water flow below Merwin for the preservation and enhancement of the downstream fishery, principally fall chinook, and to meet recreational requirements. PP&L's agreement as to the utilization of the Swift and Yale reservoirs to provide benefits downstream from Merwin is contingent on it receiving the Merwin license. "Pacific does not commit itself to release storage from Yale and Swift if the new license is issued to JOA" (Stipulation, p. 2).

PP&L's seeming resistance to coordinated operations with JOA may doom the chances of ever achieving a smooth coordinated operation of the Lewis River projects if Merwin is licensed to JOA. PP&L believes it has the power to fulfilled its own prophecy. If the Commission were to accept PP&L's veiled threats of non-cooperation and non-coordination as a basis for denying the license to JOA this would mean that every present licensee whether private or public on a river with two or more projects could be assured renewal of its license simply by following PP&L's lead.

The successful operation of the Lewis River projects on a coordinated basis if Merwin is licensed to JOA is, in the end, dependent upon the good-faith and public mindedness of both PP&L and JOA. PP&L has created considerable uncertainty as to whether it is willing to fulfill its responsibility as guardian and trustee of the water resources harnessed by the Yale and Swift No. 1 projects by con-

tinuing to coordinate those resources with those of Merwin if Merwin is licensed to JOA.

With the cloud PP&L has placed over a matter so vital to the public interest, the judge finds that PP&L should be required, pursuant to Article 18 of its Yale and Swift No. 1 licenses, to coordinate its operations with those of JOA at Merwin. This will be accomplished by separate Commission orders in the Yale and Swift No. 1 project dockets. Those orders would issue on the date this decision becomes final and would incorporate the findings made in this decision. The judge recommends that the Commission adopt the two sample orders shown in Appendices C and D of this decision.

The authority of the Commission to order PP&L to coordinate its operations with those of JOA is set forth in Section XII of this decision, "Commission Authority to Order Coordinated Operations".

PP&L's refusal to enter into coordinated operations with JOA at Merwin would constitute grounds for the Commission proceeding under Section 26 of the Act.

The judge understands that there must necessarily be compromise by both JOA and PP&L in the negotiations leading to a coordination agreement. Neither JOA nor PP&L should place unreasonable demands on the other which would jeopardize the chances of reaching an equitable and effective agreement in prompt order. JOA is no less obligated than PP&L to engage in good-faith negotiations.

IV. Power Production

Both applicants' plans are virtually the same with respect to power production. Neither applicant proposes any present change in Merwin's power production or new facilities. Both applicants have stipulated as to their need for Merwin power (Stipulation 7). With respect to future development at Merwin, both applicants expressed the view

that it would be dependent upon each utility's need for generation after considering the effect of the Northwest Power Pool, the Pacific Northwest Coordination Agreement and the Regional Act (Stipulation 13). While PP&L's witness Wilson testified that PP&L would do an increasing amount of peaking with its hydro resources (Tr. 511), staff witness Fargo testified that Merwin's regulating function would seriously limit its use for peaking (Tr. 1666). With respect to actual operation of the Merwin facility, both applicants are equally qualified to carry out the responsibilities of project ownership. (See Stipulation 6 and pp. 8-10 *supra*).

The judge finds that with respect to power production there is no material difference between the plans of PP&L and JOA.

V. Flood Control

PP&L and JOA agree that a total of 70,000 acre-feet of dependable flood-control storage should be maintained at the Lewis River reservoirs—Merwin, Yale and Swift (Ex. T-8, p. 9; Ex., T-23, p. 14). PP&L is close to reaching an agreement with the Federal Emergency Management Agency (FEMA) which would formalize PP&L's flood control obligation (Ex. T-8, pp. 19-22). PP&L's proposal would involve coordinating the three storage reservoirs and splitting the storage requirement between them. JOA commits itself to working out a similar agreement with FEMA and PP&L if it is awarded the license, and has proposed a license condition to that effect (Ex. T-26, pp. 7-8; Tr. 1021, 1053). JOA's plan, like that of PP&L, envisions coordination of the three Lewis River reservoirs.

The judge finds that JOA's plans for flood control are in all material respects the same as those of PP&L.

JOA's proposed flood control license condition set forth in its Reply Brief, Appendix D, p. 1, appears reasonable and will be adopted.

VI. Fish and Wildlife

PP&L and JOA have both agreed to work with the Washington Department of Fisheries and the Washington Department of Game (collectively WFG) in developing formal agreements to protect, mitigate and enhance the fish and wildlife that may be affected by Merwin.

WFG takes no position as to which applicant should receive the license. On brief, WFG counsel states that "[t]he course of this proceeding (and negotiations with the applicants) have led to the conclusion both applicants will implement faithfully whatever fish and wildlife measures are directed as a result of the proceeding" (WFG Reply Br. pp. 1-2). Staff reaches much the same conclusion.

PP&L, JOA and the Washington Department of Fisheries (WDF) have successfully negotiated an agreement for the regulation of downstream flows from Merwin for the preservation and enhancement of native fish, principally fall chinook. The provisions of that agreement have been incorporated as conditions to the license issued herein. Since the agreement assumes the use of storage in the Yale and Swift reservoirs but PP&L only agrees to provide that storage if it is issued the new license for Merwin, the minimum flow condition shall be revised, as recommended by staff, to require JOA to negotiate with PP&L for upstream storage to support the required minimum flows. JOA shall, of course, be required to compensate PP&L for such upstream support. Further, the flow regime condition shall be changed to reflect the comments filed on February 3, 1983, by the National Marine Fisheries Service (NMFS) that its statutory authority be recognized in this area. No party opposes NMFS' proposed change.

In their briefs the parties advise that negotiations are continuing on fish and wildlife matters. The parties intend to continue their discussions with WFG in the hopes of arriving at an agreement before final action is taken in

this proceeding (PP&L Reply Br. p. 88). If this does not occur, PP&L recommends that those provisions that have been agreed to be incorporated in the license with the standard provision that the parties (in this instance JOA and WFG) have a year to reach agreement on the remaining issues. (*id.*). PP&L's proposal appears reasonable and is adopted. Accordingly, the question of whether or not there should be an allocation of mitigation costs among the three Lewis River projects need not be addressed at this time. Similarly, WFG's suggestion concerning the funding of two Department biologists by the successful applicant can await the completion of settlement discussions.

JOA's and PP&L's plans for dealing with fish and wildlife resources are essentially the same because both have basically accepted, but for certain details in the process of being negotiated, the fish and wildlife recommendations of WFG (Tr. 1037).

To implement the WFG wildlife mitigation plan will call for JOA to acquire the use of non-project lands owned by PP&L or, in the alternative, to acquire land of equal quality and quantity. Either alternative is acceptable to WFG (See WFG Br. p. 15). JOA believes it can acquire the necessary land within one year if it cannot reach an agreement with PP&L for the use of its land. JOA has recommended a condition to that effect. Staff concurs with WFG that an alternative site would be acceptable because the PP&L land is not unique (Tr. 1308). The judge finds JOA's proposed condition reasonable, and it will, therefore, be recognized as part of the wildlife mitigation license condition. The one-year period allotted JOA to acquire non-project lands is similar to and coincides with the standard one-year provision referred to by PP&L as the time which should be allotted either PP&L or JOA to resolve their remaining differences with WFG on fish and wildlife matters.

VII. Recreation Facilities

The Merwin project has two major recreational facilities: Merwin Park, built in 1934, and Speelyai Bay Park, built in 1960.

Both applicants recognize a need for additional recreational facilities at Merwin. PP&L and JOA propose the construction of a park at Crescent Bay. JOA goes a step further and proposes an additional recreational site on the south side of Lake Merwin at Buncombe Hollow.

WDG witness Howerton opposed the development of a recreational facility at Crescent Bay because he believes this site would be best suited for the development of a wildlife habitat (Ex. T-28, p. 8), and using this area for recreational purposes would impair its value and use for wildlife purposes (Tr. 1283, 1303-1305). Howerton did admit, however, that some accomodation [sic] between winter use of the area by wildlife and the development of summer recreational facilities was possible (*id.*).

PP&L intends to commence construction at the Crescent Bay site within one year of the issuance of the license. Before proceeding with any construction, JOA proposes to prepare a more comprehensive recreation master plan for Lake Merwin after considering public opinion and the most recent estimates of the area's recreational needs. In this connection, it should be noted that the relicensing applications of PP&L and JOA were filed April 1976 and February 1977, respectively. Staff witness Karwoski believes JOA's proposal would enhance recreational planning, development and administration (Ex. T-37, pp 4-5). To implement its proposal, JOA proposes a license condition whereby JOA would be required to submit a revised Exhibit R within one year of license issuance.

The judge believes that JOA's proposal for recreational development in the Merwin area is equally well adapted as that of PP&L. JOA's approach, *i.e.*, to develop a more

comprehensive and current assessment of recreational needs in the area with citizen participation in the process may, in the end, lead to better and more extensive public use of the project's facilities. In any event, JOA's recreational plans are at least equal to those of PP&L. The license condition proposed by staff and adopted by JOA in its Reply Brief, Appendix D, p. 3 will be adopted and included in the license.

VIII. Financing

PP&L, as present licensee, has no financing requirement.

JOA proposes to finance the acquisition of Merwin by the sale of revenue bonds as authorized under Washington state law (Item E, Exhibit G). The interest on the bonds would be exempt from Federal income tax because all of the power from Merwin would be used by Clark and Cowlitz PUDs (*id.*). The bonds would be secured by the power sales contracts between JOA and each of its two members, Clark and Cowlitz PUD's (*id.*).

The financial consulting firm of Smith Barney, Harris Upham & Co. expressed the following favorable opinion as to the reception such a bond issue would receive in the investment community (*id.* and Ex. E-61):

the security provisions for the revenue bonds as contemplated to be incorporated within the power sales agreements by and between the JOA and the two Public Utility Districts and the bond resolution of the JOA together with the individual financial strengths of the two Public Utility Districts to meet their prospective obligations under the power sales agreements of the size and scope as contemplated herein, should be construed to be a high quality investment by the municipal bond rating services and sophisticated institutional investors, and in our opinion, the revenue

bonds of the JOA under the terms and conditions as contemplated herein would be accorded an investment rating possibly as high as AA.

No party questions JOA's ability or legal authority to finance the acquisition of Merwin.

The judge finds that JOA's proposed plan of financing reasonable and sufficient to permit the acquisition of Merwin.

IX. Public Accountability

JOA argues that it should be given the edge when a comparison is made between the competing applicants' responsiveness and sensitivity to the public needs and wants. JOA claims that its status as a public body will assure greater public participation and influence in its decisions as licensee. JOA cites as an example its plans for recreational development—where public input would play a major role—and its passage of Resolution No. 15 (Ex. E-62). This resolution, among other things, provides that, if granted the license, JOA would request a condition which would require that the tax-supported school districts and other taxing districts presently existing or created in the future within the area of the licensed project, be paid by JOA an amount in lieu of tax payments, not less than the same amounts as they would receive had the project been licensed to PP&L.

While JOA's status as a publicly-created entity may bring with it certain inherent advantages in terms of public participation and input into a licensee's decision-making processes, the record does not support the view that if PP&L were to be issued the new license public accountability would be lost or compromised. PP&L's record as a licensee has been a good one. The company has shown sensitivity to the public's concerns by working and consulting with federal, state and local representatives in a cooperative spirit in carrying out its responsibilities under the license.

PP&L's witness Davenport offered numerous examples demonstrating PP&L commitment and practice in serving the public's needs and, in general, in being a good corporate citizen (Ex. T-1, pp. 23-32; Tr. 263-265, 270-271).

The judge finds no basis in this record for finding that either PP&L or JOA would be more responsive or sensitive than the other in meeting the public needs in carrying out its responsibilities under the license.

X. Economic Impacts

A. Introduction

In Opinion No. 88 in the *Bountiful* case, *supra*, and its September 29, 1981 hearing order in this proceeding, the Commission has called for an inquiry into the wider "social" or economic impacts resulting from relicensing the Merwin project, in addition to some of the more limited "technical or physical" project factors discussed above. Broadly stated, and as will hereinafter appear, that inquiry has two aspects: (1) what are the various claimed economic impacts revealed by the record and (2) which, if any, are applicable, relevant, and material under the public interest standard of Section 7(a) of the Federal Power Act in choosing between competing applicants where one, PP&L, is the original licensee and the other, JOA, is a municipality holding a statutory preference in the issuance of project licenses.

The two applicants have argued the significance of Opinion No. 88 to this proceeding. While it is unnecessary to repeat those arguments here, a detailed review of that opinion will be helpful in understanding the discussion on the merits which follows.

Opinion No. 88 did not adjudicate competing license applications, nor did it determine the limits of the public interest standard of Section 7(a). Petitions for declaratory order had been submitted by public power interests, asking the Commission to hold that the state and municipal pref-

erence provision of Section 7(a) was applicable in competitive relicensing proceedings against any non-state, non-municipal applicant, including the original licensee. The Commission held, on the legal question presented, that the preference would indeed apply in such a competitive proceeding *but only if* the Commission should first find that the state or municipal applicant's plans are, in the words of Section 7(a),

equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

11 F.E.R.C. at p. 61,735. The Commission thus held that it would view the preference as a "tie-breaker" in proceedings where the competing plans were "equally well adapted" (*id.* at p. 61,734).

The Commission's order on rehearing, Opinion No. 88-A, reveals that only the foregoing narrow preference question had been decided. That ruling was the only part of the Commission's opinion challenged on petitions for judicial review and, thus, reached by the court. *See Clark-Cowlitz Joint Operating Authority et al.*, Project No. 2791, *et al.*, Order Providing For Hearing issued September 29, 1981, slip order at 2, and *Alabama Power*, 685 F.2d at 1318.

However, as several hydro projects were already the subject of competitive relicensing applications, and others were expected to become so in the future, the Commission took the opportunity in Opinion No. 88 to address in advisory fashion the scope of the public interest standard of Section 7(a).

The Commission made clear at the outset that it would not attempt to make "a definitive statement . . . as to what showings should and must be made by the applicants in

seeking to demonstrate how their plans compare" (11 FERC at p. 61,735); but, based on the record before it and its reading of the statute and pertinent legislative history, the Commission offered "some generalizations about the public interest standard" (*id.*).

First, the Commission expressed its belief that the statute contemplates "a broad assessment, evaluating both physical and nonphysical considerations when the public interest is addressed" (*id.*). It observed that regardless of which applicant is selected, a project must be "best adapted," physically and technically, to beneficial public uses. That being the case, the Commission expressed the view that evaluation of public benefits in a competitive proceeding would require consideration not only of physical and technical factors but also "broader social impacts such as economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts," since all of these "would seem to play a role in the Commission's determination. . . ." (*id.*).

Second, the Commission stated its belief that Congress did not intend the "'public interest' to be static or frozen as of 1920" and that the "'public interest' will vary with the circumstances and needs of the time period in which it is considered" (*id.* at p. 61,736).

Third, the Commission recognized that the public interest implications of competitive relicensing may be more complex than those of an initial licensing. It stated that the choice between public and private applicants for successor licenses may result in reallocation of benefits of water power resources then in use "from the private applicant, or a segment of the public associated with it, to the public entity and the segment of the public associated with the public entity," and that the transfer itself may have some possibly disruptive effects not present in initial licensing (*id.*).

Fourth, the Commission asserted that relicensing decisions "may have important implications for the concentration and distribution of the benefits of hydropower," noting that it should be kept in mind that "a basic goal of the [Federal Power Act] is to assure that hydropower benefits are enjoyed by as much of the public as possible" (*id.*).

Finally, and most significantly, the Commission emphasized that the public interest standard of Section 7(a) has never been litigated in court and has been discussed in only a few Commission decisions and it would thus be "premature to address the applicability, relevancy and materiality of particular areas of consideration" (*id.*). Such factors, the Commission stated, could be expected to vary from case to case (*id.*). The Commission directed that the processing and consideration of pending relicensing cases involving an applicant asserting the statutory preference against a competing applicant, should go forward in light of Opinion No. 88; the Commission would thereafter make its public interest determinations based upon the record made in connection with each particular application (*id.*).

In the hearing order in the instant proceeding, *supra*, the Commission briefly revisited its discussion in Opinion No. 88 on the public interest standard of Section 7(a), again asserting that it had deemed it premature to address in a declaratory order the applicability, relevancy and materiality of particular factors encompassed by the public interest standard. The Commission believed that it would require the development of a record in individual adjudicated cases, such as this one, to give specific meaning to the broad statutory terms of Section 7(a), and it left to the judge issues concerning the particular factors to be considered in light of the "guidelines" set forth in Opinion No. 88.

Based on the foregoing, it is clear that the judge must identify and examine the various economic impacts which

Staff and the parties allege will result from relicensing Merwin, analyze their claimed magnitude, and determine which ones (if any) are applicable, relevant and material in choosing between JOA and PP&L.

B. Background

1. The Role of BPA

An appreciation of the parties' contentions requires some understanding of the role played by BPA in the Pacific Northwest, especially its function as marketing agent for electricity produced by federally developed (as opposed to federally licensed) hydroelectric projects. The ensuing account is taken primarily from Ex. T-1, pp. 4-23, and *Legislative History of the Pacific Northwest Power Planning and Conservation Act*, prepared by Bonneville Power Administration Library (Department of Energy, 1981).

The development of the Columbia River system began in the 1930's. From the beginning, the federal government has played a major role. Congress directed BPA in the Bonneville Project Act of 1937 to build and operate transmission lines and to market electricity from federally developed hydroprojects on the river at rates set only high enough to repay the federal investment over a reasonable time period (16 U.S.C. § 832).

In the early 1960's the U.S. and Canadian governments negotiated a treaty for the cooperative use of dams built by Canada on the upper reaches of the river to provide, among other things, reservoir storage for production of additional power at the U.S. dams downstream. Also in the 1960's, Congress authorized construction of three major powerlines linking the Columbia River hydroprojects with power markets in California and the rest of the Pacific Southwest.

With the dams developed in Canada and the United States, the Columbia River system provided virtually all the electricity needed in the Pacific Northwest until the

early 1970's. Thereafter, the region's publicly-owned and investor-owned utilities turned mainly to coal-fired and nuclear plants to meet load growth throughout the Pacific Northwest.

The Bonneville Project Act of 1937 directed that publicly-owned utilities and cooperatives be given first call on available federal hydropower resources. They consequently came to be known as "preference customers." It was not until the 1970's that their preference needed to be exercised and, in 1973, BPA refused to renew long-term firm power contracts with investor-owned utilities since it could not do so if preference customers were to continue to have first call on federal resources. Nonetheless, BPA continued to sell some peaking power to these private utilities and also "non-firm" power to the region's investor-owned utilities and utilities outside the region when electricity surplus to the needs of the preference customers was available.

Because of the extensive historical involvement of the federal government in the region's electrical power systems, Congress began to address the difficult questions arising from the growing pressures on a regional power supply that had once seemed inexhaustible. After three years of deliberation, in 1980, Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act") (16 U.S.C. § 839). The statute defines the Pacific Northwest region essentially to include the area consisting of Oregon, Washington and Idaho, the portion of Montana west of the Continental Divide, and such portions of Nevada, Utah and Wyoming that are within the Columbia River drainage basin.

The Regional Act directs that BPA should continue its traditional role of transmitting and marketing power, but gives it additional responsibilities. BPA now must acquire all necessary energy resources to serve all utilities (public and private) in the region who choose to apply to BPA

for wholesale power supplies. It may purchase the generating capabilities of needed new thermal plants and must spread the benefits and costs of resources among all of its customers through its rates.

Sales to publicly-owned utilities and cooperatives continue, under the Regional Act, to be governed by the supply preference and resulting price advantages established by the Bonneville Project Act of 1937. However, for the first time, a similar preference and price advantage is extended to investor-owned utilities' residential (and farm) customers in the Pacific Northwest region: the utilities sell to BPA, at their average power cost, an amount of energy equal to their residential loads; BPA sells back enough energy at BPA standard rates to cover these loads, with the rate advantages required to be passed on to such customers.

As matters stand now, the benefits of the region's low cost, federally developed hydropower are made available first under BPA's priority firm (PF) rate to its preference customers and (through the exchange contracts mentioned above) the regional residential customers served by investor-owned utilities. The balance of purchases made by investor-owned utilities are billed at BPA's higher new resources (NR) rate (Ex. T-45, pp. 9-13).

2. Existing Operations of Applicants

PP&L provides electric service to residential, commercial, industrial and other customers in the States of Oregon, Washington, California, Idaho, Montana and Wyoming by means of an integrated transmission system consisting of its own transmission lines, interconnected lines of the Northwest Power Pool (including BPA), lines of the Bureau of Reclamation in Wyoming, of Idaho Power Company and others. The Merwin project is connected to this interconnected transmission system which serves all of PP&L's customers. Merwin is operated in coordination

with the Northwest Power Pool and under the Pacific Northwest Coordination Agreement (Item A, at p. 5).

PP&L owns 863,400 kw of installed, federally-licensed hydro generating capacity (including Merwin) and over 3,000,000 kw of installed thermal generating capacity (Ex. T-16, p. 4; PP&L Initial Br. p. 6). In addition to its own generation, it currently receives power from other public and privately-owned utilities, BPA, and the Columbia Storage Power Exchange ("CSPE") (Tr. 696-700). CSPE markets Canada's share of the downstream power benefits resulting from the development of water storage projects in Canada (Item E, p. U-5).

The JOA members operate electric distribution systems coextensive with their respective county boundaries in the state of Washington. Clark PUD currently purchases almost all of its requirements from BPA, with the balance coming from Clark's participation in CSPE and the WPPSS Packwood project (Ex. T-17, p. 3; Item E, pp. U-4 and 5). Cowlitz PUD also purchases the bulk of its requirements from BPA. Its other power supply sources are Grant County PUD No. 2's Wanapum and Priest Rapids hydroelectric projects and CSPE. In addition, Cowlitz PUD holds the license for the Swift No. 2 project, and the output of that project, presently being sold to PP&L, will be withdrawn by Cowlitz for its own use in September 1983 (Item E, pp. U-4 and 5; Ex. E-54A; Ex. T-12, p. 13).

In 1981, PP&L served some 643,000 customers including about 550,000 residential customers and 92,000 commercial and industrial customers. Total system sales were 23.0 billion kwh of which 6.9 billion kwh (thirty percent) were residential sales and 11.5 billion kwh (fifty percent) were commercial and industrial sales (Ex. E-52). About 106,000, or twenty percent, of PP&L's residential customers are located in California and Wyoming, outside the Pacific Northwest region (Tr. 733).

Clark PUD sold 2.6 billion kwh in 1981 to some 81,900 customers, including 1.5 billion kwh (fifty-eight percent) to about 73,700 residential customers; Cowlitz PUD's total 1981 sales were 4.1 billion kwh to some 36,300 customers, including 635 million kwh (fifteen percent) to about 32,500 residential customers (Ex. E-52; Ex. 54-A). On a combined basis, the JOA members' 1981 sales were 6.6 billion kwh to some 118,200 customers, of which 2.1 billion kwh (thirty-two percent) were residential sales and 4.5 billion kwh (sixty-eight percent) were commercial and industrial sales.

C. The Economic Impacts Raised By the Parties

The essential economic impact of relicensing addressed by the applicants and staff is the reallocation of cost (and thus rate) burdens and benefits on ultimate consumers. The evidentiary presentations of the parties differ materially in the breadth of their analyses, the methodologies employed in measuring the cost impacts, and the conclusions to be drawn from the studies. Central to any such rate impact determination are the applicants' costs of alternative power, since Merwin power costs are not in dispute. Two other economic impacts have been raised: the effect on competition for commercial and industrial loads and the effect on concentration of the benefits of Pacific Northwest hydropower.

1. The Evidence and Arguments

a. PP&L

PP&L presented evidence that its alternative to Merwin would be a 161 mw thermal cycling plant, coal-fired, located in eastern Oregon (Ex. T-11, p. 40). The estimated construction cost in 1982 dollars for a 500 mw plant of such capability—about \$520 million (excluding AFUDC and owner's costs)—was scaled down proportionately by PP&L's witness to yield the capital cost for a 161 mw facility. That cost was then escalated to 1988 (the earliest such replacement facility could be built), the annual capital costs over a subsequent fifty-year period were calculated,

variable costs were then estimated and added for each year of that period (including an escalation factor at a 6 percent annual inflation rate over the entire period), and the resulting total future costs were discounted or "present-worthed" to yield a 1988 present value replacement or alternative power cost of \$832.4 million (Ex. T-13 p. 2; Ex. E-32). This calculation also supports the severance damage claimed by PP&L if JOA succeeds to the license. On a levelized basis, PP&L calculated such cost of replacing Merwin would equate to \$123.7 million per year. A "levelized" costing determines the equal annual amount of future costs which, when discounted at an appropriate time value of money, will equal the present value of all future costs to be recovered. The \$832.4 million figure is compared by PP&L with the 1988 present value for Merwin power of \$27 million and measures the adverse impact on PP&L's system revenue requirement if Merwin is lost (Ex. T-16, p. 9).

This impact would fall heavily on PP&L's systemwide commercial and industrial customers. Those in the State of Washington already pay nearly twice the rates paid by similar customers of Clark and Cowlitz PUDs. PP&L estimates that if the cost of the alternative resource were discounted back to 1981 dollars and substituted for Merwin in PP&L's most recent submission to the Washington commission, PP&L's commercial and industrial rates in Washington would need to be increased by eight to ten percent and a similar rate impact would be felt by PP&L's commercial and industrial customers in the other states (Ex. T-16, pp. 8-10; Tr. 721, 733).

PP&L shows that municipalities already either own or have BPA preferential purchase access to eighty-five percent of the Pacific Northwest hydropower, although they serve only forty-one percent of the customers in the region, while private utilities which serve fifty-nine percent of the region's customers have only fifteen percent of the hydropower resources. PP&L similarly calculates that if it

were to lose all of its licensed projects on the Lewis, Klamath and Umpqua Rivers, the result would be to increase its commercial and industrial rates by about fifty percent (Ex. T-16, pp. 11-12).

On the basis of these facts, PP&L argues that commercial and industrial customers on its system and its residential customers outside the Pacific Northwest region in California and Wyoming will suffer a very substantial rate burden if Merwin is lost, far outweighing any benefits to JOA members' customers if JOA succeeds in the license contest.

It further argues that there is now an unwholesome concentration or "monopolization" of Pacific Northwest hydropower benefits in municipalities and that any increase in that concentration resulting from relicensing Merwin will have serious and improper anticompetitive effects, especially on PP&L's ability to compete with JOA members for commercial and industrial customers and, in turn, on the ability of PP&L's commercial and industrial customers to compete with those of the JOA members. It warns that such competitive disadvantage will be exacerbated, both for PP&L and other private entities, if in the future the precedent set by a JOA takeover of Merwin results in the loss by PP&L and other private utilities of all their Pacific Northwest licensed projects. PP&L contends that the Commission may not countenance such an increase in hydropower benefit concentration and the attendant anticompetitive effects, consistent with its general duty under the Act to give consideration to the nation's anti-trust laws and with the specific provisions of Section 10(h) of the Act which conditions all licenses to prohibit, "[c]ombinations, agreements, arrangements or understandings . . . to limit the output of electric energy, to restrain trade, or to fix, maintain or increase prices for electrical energy. . . ."

Both the California PUC and the Oregon PUC generally support PP&L's position on the adverse cost and rate impacts and effects of further hydropower concentration resulting from JOA's acquisition of Merwin.

b. JOA

The alternative power supply for Clark and Cowlitz PUDs are their purchases from BPA under the PF rate, and with Merwin each of the PUDs would be able to reduce its purchases from BPA by 270 million kwh annually. JOA estimates that the Merwin supply would cost about 5.8 mills per kwh compared with purchased power costs in 1983 under BPA's recently imposed PF2 rate of 22.5 mills per kwh for Clark PUD and 17.5 mills per kwh for Cowlitz PUD (Ex. T-19B, p. 11). Clark PUD would be able to reduce its annual power costs by \$4.5 million and Cowlitz PUD by \$3.2 million.

Clark PUD's savings would reduce its average power costs by 1.3 mills per kwh. If this reduction were spread *pro rata* on the basis of sales to all customers, each residential customer would save about \$30 per year (Ex. T-19B, p. 12). With Cowlitz PUD the situation is different. Cowlitz PUD reserves the benefits of its lowest cost power supplies for its residential customers. With its purchases from the non-federal Priest Rapids and Wanapum projects at a cost of 4.7 mills per kwh and with the availability of its own Swift No. 2 project supply in 1983, Cowlitz PUD will be able to serve its residential requirements until 1985 from non-federal hydro sources; with Merwin licensed to JOA, Cowlitz PUD will not have to buy BPA power to meet residential load until 1990. Starting in 1985, Merwin power, in lieu of BPA purchases, will save Cowlitz PUD residential customers \$3.3 million annually, or \$102 per year per customer (Ex. T-19B p. 13).

In contrast, JOA calculates that PP&L's system wide average cost of power production would increase 0.7 mills per kwh, based on PP&L's 1980 power production costs

and substitution of purchases from BPA under its NR rate for the Merwin power; at the 1983 NR rate, PP&L would experience a systemwide cost increase of \$26.3 million without Merwin (Ex. T-19, p. 14; Ex. T-20, p. 4). None of this increase would be assessed, after 1985-1986, on PP&L's residential customers in the Pacific Northwest region. The residential exchange provision of the Regional Act covers fifty percent of the private utilities' residential loads in the region for the year beginning July 1, 1980, increasing in equal annual increments to 100 percent in the year beginning July 1, 1985 and subsequent years. 16 U.S.C. § 839c(c)(2). If in 1981, PP&L had substituted BPA purchases at BPA's 1982 rate for Merwin, the rate impact would have been an increase of about 1.4 percent for its California and Wyoming residential customers and 1.7 percent for its system commercial and industrial customers (Ex. T-21, pp. 3-4).

JOA contends, first and foremost, that none of the economic impacts addressed by staff and the applicants is relevant to the grant of a license in this proceeding since, whatever their measure, they all stem from a policy heretofore made by Congress and, thus, are beyond the scope of any public interest consideration by the Commission under Section 7(a) of the Act.

That contention aside, JOA, concentrating primarily on short-term impacts in the "region" (i.e., the Lewis River Basin surrounding the Merwin project), emphasizes the rate benefits to be realized by the customers of its member PUDs, particularly the per customer benefits of the residential class who constitute the ultimate public. Such benefits, coupled with the fact that the eighty percent of PP&L's residential customers located within the Pacific Northwest will suffer no rate impact whatsoever if PP&L loses Merwin, clearly demonstrate in JOA's view that the public interest would be served if JOA is successful here.

Moreover, JOA contests PP&L's calculation of rate impacts on the other customers on PP&L's system because they are based on the cost of a thermal plant which has not been shown to be needed: PP&L can substitute Merwin power with BPA purchases under the NR rate, which rate is supported by a blend of resource costs that, at least temporarily, would include the low cost federal hydropower freed up by Clark and Cowlitz PUDs' backing off on BPA purchases under the PF rate; when purchases at the NR rate are taken as the alternative power cost for PP&L, the impacts on PP&L's California and Wyoming residential customers and systemwide commercial and industrial customers are minimal.

Further, if the statutory term "region" is to be viewed as comprising an area more extensive than the Lewis River Basin, JOA contends that it should not be measured by the service areas of the competing applicants, but should encompass the entire Pacific Northwest region, in which case the overall dollar rate impacts on consumers in the region would be a "wash."

Finally, JOA denies any unlawful anticompetitive conduct on its part or the showing by PP&L of any actual anticompetitive consequences flowing from JOA's acquisition of Merwin.

c. Staff

Staff made a calculation of short-term rate impacts on PP&L and the JOA members, with and without Merwin, using typical FERC rate case cost-of-service methods applied to 1981 recorded book costs of the applicants. It took as the alternative power cost for PP&L its average power cost in 1981 without Merwin, and for the JOA members their 1981 purchases from BPA at the then effective BPA rates (Exs. T-32, T-32A). The results show that without Merwin, PP&L's system costs would have been increased 0.63 mills per kwh or a total annual dollar amount of \$15,169,000 (Ex. T-32B; Ex. E-68B). Similarly, the JOA

members' combined power costs would have been reduced by 1.25 mills per kwh with Merwin, or a total annual dollar amount of \$1,701,000.

Staff also recalculated the 1983 rate impacts on Clark and Cowlitz PUDs presented by JOA. Staff shows that if the proper BPA rates are employed, the combined savings of Merwin to the JOA members would be about \$6.4 million or 0.79 mills per kwh if all customers share equally (rather than Cowlitz PUD's assignment of Merwin to residential customers)—\$3.5 million for Clark PUD (1.048 mills per kwh) and \$2.9 million for Cowlitz PUD (0.61 mills per kwh) (Staff Initial Br. p. 16). Staff compares these JOA savings to the increased system costs for PP&L of \$26.3 million without Merwin inherent in JOA's presentation based on 1983 BPA rates (*id.* pp. 21-22).

Assuming that PP&L would have to replace Merwin with coal-fired generation (which staff is not willing to concede), staff would accept most of PP&L's costing assumptions, but would adjust PP&L's 1988 present value calculation to eliminate the six percent inflation escalation beyond the tenth or fifteenth year and the cost of interim replacements. With these adjustments, staff calculates a 1988 present value for future power costs from the thermal plant of \$731.7 million (*id.* p. 31, modifying Ex. T-44). The levelized annual cost associated with staff's \$731.7 million present value would be on the order of \$105 to \$110 million using the relationship between levelized cost and present value shown by PP&L. In comparison, staff estimates a levelized annual cost to JOA of not receiving Merwin of about \$22 million, employing JOA's estimate of future escalations in BPA rates (*id.* p. 28).

Staff argues that none of the economic impacts addressed by the parties justifies denial of a license to JOA. Although its own calculations, and others, show greater short-term cost and rate impacts on PP&L than on JOA from the Merwin license, staff contends that decisional

weight ought to be placed on long-term impacts rather than short-term impacts.

As to long-term cost impacts, staff argues that the record shows that while the PP&L system will become energy deficient in 1985, the Pacific Northwest will have surplus energy for at least the next ten years and PP&L will rely on sources outside its system to meet its requirements over that period. Thus, in staff's view, PP&L has no plans to build thermal capacity to replace Merwin capacity which, in any event, is insignificant compared to PP&L's total projected shortfall of 5,000 mw in the year 2000. Staff sees further uncertainty in PP&L's future power capacity planning if one considers BPA purchases under the NR rate constituting the alternative to Merwin: the future level of that rate is uncertain and PP&L's access to that source can be curtailed on five-years' notice if PP&L fails to build capacity on behalf of BPA.

The short-term cost impacts, staff argues, provide only a one-year "snapshot" and, thus, say little about the public interest over the future license period. Staff considers them minimal in any event.

Staff also argues that PP&L has made no showing that granting the license to JOA will have anticompetitive consequences; instead, staff believes it may promote competition. Staff contends that PP&L has identified no antitrust law or policy which would conflict with the approval of JOA's proposal.

2. Discussion

a. Cost and Rate Impacts

At the outset, it must be emphasized that the record does not permit a determination of precise cost and rate impacts on PP&L and JOA of relicensing the Merwin project upon which the Commission could reasonably rely with confidence. Neither staff nor either of the applicants has

made a presentation which could be relied upon to the exclusion of the others; no party appears to urge to the contrary and, as PP&L concedes, "the circumstances of this case preclude a neat arithmetical calculation determining the exact economic impact in each of the next 50 years" (PP&L Reply Br. p. 24). Nor may clear-cut comparisons be made between the presentations of staff and the applicants since, as described above, the presentations address different time frames and employ differing costing methods. What can be reasonably determined is the general, relative cost and rate impacts on the applicants resulting from relicensing, and the appropriate parameters within which such impacts should be addressed.

The key to these relative impacts is the cost of alternative power to each of the competitors. To the extent that one applicant has an alternative power cost higher than the other, it is indisputable that such applicant will inevitably, on a system-wide basis, experience greater total dollar cost burdens without Merwin than will be saved by the other applicant with Merwin. The evidence is convincing that PP&L, whether it is forced to build a new thermal plant to replace Merwin, substitutes BPA power purchased at the NR rate, or (in the very short term) steps-up generation from its existing production facilities, will incur a higher alternative power cost over all relevant periods than JOA. BPA's PF rate, which defines JOA's alternative power cost and is supported by cheap federal hydropower resources, is now and can be expected to remain at a level below any alternative power cost of PP&L.

Certain other facts are well established. First, approximately eighty percent of PP&L's residential customers are located in the Pacific Northwest and will be served under the residential exchange provisions of the Regional Act and receive the benefits of BPA's PF rate (rather than being exposed to PP&L's average power costs), whether or not PP&L receives the Merwin license. Therefore, relicensing will have no rate impact on these regional res-

idential customers, and the full systemwide cost impact from PP&L's loss of Merwin would have to be borne by PP&L's remaining customers. Second, to the extent that PP&L looks to purchases from BPA under the NR rate to replace lost Merwin production, such purchases are available only to meet PP&L's requirements (other than residential exchange requirements) in the Pacific Northwest region: cost and rate impacts on any of PP&L's customers in California and Wyoming cannot be measured by direct reference to the BPA NR rate (Tr. 1693). Cost impact calculations which measure PP&L's cost of all replacement power at the BPA NR rate are, to this extent, misleading. Third, while PP&L would derive larger total dollar system benefits by retaining Merwin than would JOA from acquiring Merwin, the benefits per system residential customer clearly favor the JOA members.

This last observation raises the question whether great and perhaps controlling weight should be given, as JOA contends, to the benefits conferred on residential customers. There are cogent reasons why the benefits per system customer, or per residential customer, should not be determinative.

The calculation of benefits per system customer would automatically favor the competitor with the fewer number of customers, without regard to the mix of customers or their requirements. Further, giving great weight to such a calculation would inherently mean that larger benefits for the few take precedence over smaller benefits for the many. Such a conclusion hardly comports with the public interest. Nor should consideration be limited to benefits per residential customer. The Commission has, in Opinion No. 88, *supra*, directed an inquiry into "broad" public interest considerations. The "public" whose interest the Commission should consider in its evaluation extends beyond a single, narrowly defined customer class and encompasses, at the very least, the full range of interests directly affected by its order. *See, e.g., Scranton-Spring*

Brook Water Service Co., 17 F.P.C. 25, 33 (1957) (In a proceeding to secure natural gas service for a distribution company, the Commission held that the "public" in "public interest" included the applicant, the coal and railroad intervenors and "every other person in the area to be affected by applicant's proposal").

Another contention made by JOA is that the word "region" in Section 7(a) of the Act should in this case be construed to mean the Lewis River Basin surrounding the Merwin project, essentially the vicinity of the service areas of Clark PUD and Cowlitz PUD. Consideration of the relicensing cost and rate impacts only on consumers in that limited area would, of course, require finding for JOA on the issue without looking further; JOA would, in effect, win by default since PP&L would have few, if any, customers in the "region" so defined. As in the case of its argument respecting benefits per residential customer, JOA's narrow approach here has no merit.

However, JOA's alternative construction of "region" to encompass the Pacific Northwest area has considerable merit. The relicensing of Merwin does not change the total requirements for or supplies of power in the Pacific Northwest, now or in the future, nor does it change the cost of such supplies. As PP&L's policy witness stated, Merwin, in effect, constitutes a power supply for all systems in the Pacific Northwest, and power generated at Merwin is available to any consumer in the region (Ex. T-1, pp. 4-5). The low cost BPA preference rate power to be released by JOA if it acquires Merwin will, in turn, provide savings to other purchasers from BPA by displacing their higher cost power. Part of such savings may return to PP&L through the NR rate. This "ripple" or displacement effect will tend to produce a "wash" of costs and benefits in the Pacific Northwest. If a final balance of cost burdens and benefits is not achieved within the Pacific Northwest as defined in the Regional Act, the displacement effect will spill over outside the region. Through PP&L or BPA, Mer-

win is interconnected via the Western Interconnected Systems with all major utility systems west of the Rocky Mountains (Ex. T-1, p. 15). The net result of successive displacement of higher power costs would be to produce total dollar savings on the systems of the JOA members and those other systems benefiting from the released BPA preference power which would match the increased costs on the PP&L system. Taking the comparison of cost burdens and benefits to the ultimate impacts beyond the systems of PP&L and the JOA members conforms to a broad consideration of the full range of interests which would be affected by granting the license to JOA.

Returning once again to the relative cost burdens and benefits on just the systems of the two applicants, staff is correct that the primary focus should be on long-term impacts, but staff's blithe dismissal of new coal-fired thermal generation by PP&L to replace Merwin as "unplanned," and its attempt to bury the lost Merwin capacity in PP&L's projected need for 5,000 mw of added capacity by the year 2000, are not persuasive. By 1985, PP&L will be deficient in power supply (Ex. T-20, p. 3). A substitute for the cheap Merwin supply will, in the long term, have to come from somewhere. The only serious long-term substitutes advanced and supported on this record are thermal generation installed by PP&L or purchases by PP&L from BPA at future NR rates. But, as staff itself recognizes, long-term reliance on BPA purchases contemplates that PP&L will provide capacity to the pooled resources and, as noted, PP&L will be capacity deficient after 1985. The Pacific Northwest as a whole has a power surplus that is currently projected to last for only ten years. While, as PP&L concedes (Reply Br. p. 22), the NR rate may be buffered for a time by low-cost hydropower not needed to serve loads under the PR rate, the reasonable inference is that beyond that surplus period, new resources—for the most part coal-fired generation (Ex. T-11, pp. 32-33)—will have to be committed to the BPA system, and will con-

stitute the principal, if not the sole, supply for NR service which will be priced accordingly. Thus, it is not at all unreasonable to anticipate that Merwin power would eventually be replaced by PP&L at a cost reflecting that of future coal-fired generation.

This is not to say, however, that PP&L has reasonably estimated the 1988 present worth of thermal generation costs. The assumption that operating costs, including fuel costs, will escalate at a six percent rate for fifty years is not supported by accepted power cost planning procedures (as pointed out by staff witness Biggerstaff, Ex. T-44, p. 6), by current inflationary trends, or by any demonstrated historical precedent in the nation's history. Even if one were to reduce PP&L's claimed \$832.4 million present worth to the \$731.7 million figure calculated by staff, which reduction (as far as it goes) appears reasonable on its face and is apparently acceptable to PP&L for purposes of this issue (PP&L Reply Br. p. 21 n.21), the problem is not resolved. No reliable determination of the cost and rate impacts on customers on PP&L's system over a fifty-year period (or any shorter relicense period) can be based solely on a present worth calculation of a costly alternative thermal plant since, as previously noted, PP&L could either produce replacement power or purchase it from BPA at a lesser cost at least for the next ten years.

Further, a calculation of benefits to JOA over such a long-term period would require a projection of future PF rates over the long term. No reliable projection of those future PF rates can be made. Staff attempts such a projection on brief (Initial Br. p. 28) using an unsupported estimate made by JOA that the PF rate would escalate thirty-five percent in 1983 and ten percent annually thereafter. The staff witness, in possession of the JOA estimate, declined to make such a projection (Ex. T-44, p. 11).

Thus, staff's ultimate conclusion that relative long-term cost impacts of relicensing Merwin cannot be reasonably

quantified is sustained. This is a result caused by the inherent inability to make such long-term projections because of the many unknowns and variables involved and not simply a deficiency in the record. The relative short-term cost impacts are in the minimal range described by staff, and these indicate the direction, if not the magnitude, of the relative long-term impacts.

b. Anticompetitive Consideration

The existing concentration of Pacific Northwest hydropower benefits in municipalities has not been shown to constitute a monopoly condition nor is there any showing that such concentration arose as a result of any conduct which violates the antitrust laws.

At the outset, it is necessary to put in better perspective the matter of hydropower concentration. Total existing installed hydro capacity in the Pacific Northwest is some 29,300,000 kw. Merwin's 136,000 kw capacity accounts for slightly less than 0.5 percent of that total. The total installed hydropower capacity consists of about 18,600,000 kw of BPA-controlled federally-developed capacity and about 10,700,000 kw of federally-licensed capacity. Private utilities own about 4,255,000 kw (about forty percent) of the federally-licensed capacity and municipalities own the balance of about 6,500,000 kw. Merwin capacity represents about 1.3 percent of the total federally-licensed capacity. PP&L owns 863,400 kw of federally-licensed capacity (including Merwin) while the JOA members own 71,000 kw (Cowlitz's Swift No. 2). See Ex. T-16, pp. 4-6.

Looking solely to federally-licensed capacity, the amounts owned by municipalities compared with private utilities, or by JOA compared with PP&L, do not suggest any undue concentration in public bodies generally or in JOA, regardless of the disposition of Merwin.

If one expands that examination to all hydroprojects in the Pacific Northwest, the concentration ratios presented

by PP&L must be restated, since they omit from the private utilities' share the hydropower from BPA under residential exchange agreements and from projects owned by others to which the private companies have both withdrawable and long-term firm access (Ex. T-12, pp. 13-14; Tr. 695-699). When this is done, the private utilities' current share amounts to substantially more than fifteen percent.

As staff observes (Reply Br. pp. 9-10), the antitrust offense of monopolization has two elements: possession of monopoly power in the relevant market area and the willful maintenance of that power. PP&L has made no attempt to define the relevant market and thus demonstrate that the foregoing percentages relating solely to hydropower concentration constitute a market share. Further, there is no attempt by PP&L to justify the aggregation of JOA with other public bodies for purposes of calculating a market share or to show that JOA has engaged in conduct, alone or with others, that amounts to willful maintenance of monopoly power. In short, PP&L has presented neither evidence nor argument supporting its conclusory statement that relicensing Merwin to JOA will further a prohibited monopoly condition.

PP&L fares no better in supporting its claim that relicensing Merwin to JOA will have a prohibited anticompetitive effect on its ability to compete for commercial and industrial sales or on the ability of its customers in those classes to compete with similar customers of the JOA members. The fact that PP&L's rates are currently higher than those of the JOA members for these services—and such disparity will increase if JOA acquires Merwin—is insufficient, without more, to support a charge of prohibited anticompetitive effect.

At any rate, the claim that PP&L's commercial and industrial rates would rise eight to ten percent if it loses Merwin is exaggerated. It is based, in part, on the as-

sumption that its excessively costed thermal plant was on line in 1981, some seven years earlier than it could possibly be built. A more realistic short-term estimate of the impact is on the order of a 1.5 to 2 percent increase. *See*, JOA Initial Br., pp. 83-84; staff Reply Br., pp. 15-16.

There is no allegation or showing that the JOA members have engaged in or are likely to engage in predatory or discriminatory practices, alone or in collusion with others. The *Conway* case cited by PP&L addressed unlawful discriminatory pricing practices by a utility in its sales to a wholesale customer which caused a "price squeeze" on such customer in competing with the utility for industrial loads. *FPC v. Conway Corp.*, 426 U.S. 271 (1976). No comparable situation exists here or will exist if JOA acquires Merwin.

Further, PP&L has made no showing that the existing price differential in commercial and industrial rates, or any increase resulting from JOA's acquisition of Merwin, has adversely affected, or will adversely affect, its ability to retain or attract commercial and industrial loads (Tr. 706-712); and the evidence of no commercial or industrial customer of PP&L has been presented to support any claimed inability to compete with similar customers of the JOA members. Conversely, staff's contention that JOA's acquisition of Merwin will promote competition in the commercial and industrial markets is similarly unsupported.

C. Applicability of the Economic Factors to the selection Process

Finally, there remains the question whether the specific economic impacts described above, however measured, fall within the scope of a broad public interest determination under Section 7(a) of the Act. The judge believes that they do not.

In license proceedings where a municipal applicant competes against a private utility applicant, Section 7(a) of

the Act requires the Commission to afford the municipal applicant, whose plan is not "equally well adapted," an opportunity to cure, "within a reasonable time," any deficiencies found by the Commission and thus make its plan "equally well adapted." The only reasonable inference is that Congress had in mind deficiencies of a quality and nature such that a willing and able municipal applicant could, within a reasonable time, overcome them and prevail in the license contest.

But how could JOA possibly amend its plan to remedy claimed public interest shortcomings such as those raised here by PP&L, and yet secure the project benefits? Any adverse cost and rate impact on PP&L's customers, as compared to JOA's customers, resulting from relicensing is the direct and unavoidable consequence of the fact that PP&L's alternative power costs are significantly higher than JOA's. The alleged anticompetitive impact on PP&L's ability to retain or attract commercial and industrial loads is similarly grounded in PP&L's claim that its cost of serving such loads will increase, because of its higher alternative power costs, relative to its competitors' costs of serving such loads. Also, any further concentration of access to low cost hydropower in public bodies in the Pacific Northwest resulting from JOA's acquisition of Merwin simply acknowledges that JOA is a public body and, with the license transferred to JOA, public bodies as a whole will have even greater access to hydropower.

None of these inherent, underlying causative conditions are matters which JOA (or any other similarly situated willing and able applicant) can change, within a reasonable time or otherwise. Ironically, the only non-curable "deficiencies" in JOA's plans would stem directly from the preference Congress accorded it in purchasing BPA power. The only action which JOA could take to overcome the alleged public interest deficiencies would be to assign the benefits of the Merwin project to PP&L—an action not

required by a fair reading of Section 7(a)—thus making its application for the license a futile act.

The inherent underlying conditions which give rise to these alleged adverse economic impacts did not come about in a manner which contravenes the public interest. On the contrary, as noted above, the extent of existing concentration in public bodies of access to hydropower benefits in the Pacific Northwest and the lower alternative power costs, when compared to PP&L, enjoyed today by JOA are the direct and inevitable outgrowth of a longstanding Congressional policy giving public bodies a preference to the benefits of federally developed hydropower in the Pacific Northwest. That policy, first made effective in 1937 (18 U.S.C. § 832c(d)), was reconfirmed as recently as 1980 by the Regional Act (18 U.S.C. § 839c(a)).

Nor should the subsequent creation of a municipal preference to the benefits of federally developed hydropower be viewed as undercutting the earlier creation in 1920 of the municipal preference to the benefits of federally-licensed hydropower. The judge's attention has been called to nothing in the subsequent legislation which would permit such an administrative determination. In fact, the Regional Act seems to suggest otherwise. Congress there stated (18 U.S.C. § 839) that the purposes of the Regional Act and other laws applicable to the Federal Columbia River Power system are all intended to be construed in a consistent manner and that one such purpose is,

(5) to insure, subject to the provisions of this chapter—

(A) that Congress intends that this chapter not be construed to limit or restrict the ability of customers [of BPA] to take actions in accordance with other applicable provisions of Federal or State law, including but not limited to, actions to plan, develop, and operate resources

and to achieve conservation without regard to this chapter. . . .

One of the "other applicable provisions of Federal . . . law" is, of course, the municipal preference provision of Section 7(a) of the Federal Power Act.

When it created the municipal preferences, Congress could not have more plainly expressed its intention to skew competition for the benefits of federally-developed and federally-licensed hydropower by favoring public bodies as against private utilities. That the benefits of these limited and valuable hydropower resources in the Pacific Northwest are becoming increasingly concentrated in municipalities is the inevitable consequence of that congressional policy. While one may reasonably question the wisdom of continuing a federal policy of preferences which inevitably favors customers served by public bodies over similar customers served by private utilities, that policy is not a proper subject of debate before this forum.

In light of all the foregoing, the judge finds that, on this record, the specific economic impacts discussed above are beyond the scope of matters entrusted by Congress to the Commission's purview under Section 7(a) and thus are not factors which, under the guidelines of Opinion No. 88, are applicable, relevant and material to a determination of the broad public interest in this proceeding.

XI. License Conditions and Related Matters

In addition to the license conditions discussed and adopted in the preceding sections, certain additional conditions have been proposed and a modification has been urged in the list of facilities proposed to be included as part of the Merwin license.

Staff recommended that certain "[a]rticles [conditions] routinely included in any relicensing of a major project" be included in the new Merwin license (staff Initial Br. Appendix C). No party opposes the inclusion of these con-

ditions. They appear reasonable and consistent with the purposes of the statute and will accordingly be adopted and included as license conditions, Articles 29-33.

JOA proposes a condition which would require it to pay taxes to the local school and other taxing districts in an amount equal to that which would otherwise have been paid by PP&L (JOA Reply Br. Appendix D, p. 5). No party objects. The condition is intended to meet the concerns expressed by the City of Woodland and other groups in the surrounding Cowlitz County area (Ex. T-26, p. 8).

The judge views the proposed condition as a voluntary undertaking on JOA's part and not one that is required in order for the Commission to carry out the purposes of the statute. Accordingly, it will not be included as a license condition. This action will not, of course, affect JOA's outstanding commitment to make such payments pursuant to Resolution 15 passed by JOA's Board of Directors on June 28, 1982 (Ex. E-62).

Both applicants propose to include in the new Merwin license two 115 KV transmission lines owned by PP&L which are not part of the original Merwin license (Item A, p. 4; Item E, Ex. J at 1). Staff opposes the inclusion of these lines in the Merwin license arguing that they are not "primary lines" within the meaning of Section 3 (11) of the Act (*see* staff witness Smith's testimony, Ex. T-43, and staff Initial Br. pp. 65-68). On brief, no party expressed opposition to staff's recommendation. Staff's position is well-documented and consistent with Commission precedent. Accordingly, the two 115 kv transmission will not be included as part of the new license project's facilities.

XII. Commission Authority to Order Coordinated Operations

Staff and JOA argue that the Commission has the authority to compel coordinated operations under Standard

Article 18, incorporated by reference in both the Swift No. 1 (16 F.P.C. 1117, 1120 (1956)), and Yale (10 F.P.C. 917, 919 (1951)), licenses. Standard Article 18 of Form L-6 is found at 12 F.P.C. 1274 (1953), and provides as follows:

Article 18. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected: *and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.* (Emphasis supplied).

PP&L argues that the Commission may not rely on Article 18 in this proceeding to require PP&L to operate the Yale and Swift reservoirs in cooperation with JOA's operation of Merwin (Reply Br. p. 56). PP&L argues along several different fronts, any of which, if correct, would dlegally bar the commission from ordering coordinated operations. The judge sees no distinction between the term "cooperation" as used by PP&L and the term "coordination." If there is a distinction, it is without a difference,

for the import of an order to coordinate carries with it an obligation to cooperate.

PP&L first asserts that the commission does not have jurisdiction to consider the possible impact of Article 18 in this proceeding, for PP&L's Swift and Yale licenses are not at issue here. PP&L maintains that the Commission may act under Article 18 only after notice and opportunity for hearing as provided in Section 6 of the Act. Section 6 provides, in relevant part, as follows:

Licenses . . . may be altered . . . only upon mutual agreement between the licensee and the Commission after thirty days' public notice.

PP&L is in error on several counts. First, the consent and 30 days' notice requirement of Section 6 of the Act is applicable in only those cases where the Commission seeks to alter a license. The commission has construed Section 6 of the Act to prohibit only substantial alterations in a license without the consent of the licensee. For example, in *North Kern Water Storage District*, Project No. 4111-000, Order On Appeal Affirming Staff Action, 15 F.E.R.C. ¶ 61,131 (1981) the Commission held (at p. 61,298):

The encroachment on an upstream project by the reservoir of a downstream project would not usually require a substantial alteration of license: it merely raises the tailwater and reduces the operating head at the upstream project. Complete inundation of licensed project works or, as proposed here by the District, diversion of a stream requiring complete retirement of licensed project works, clearly would involve substantial alteration of a license, and the consent of the licensee would be required pursuant to Section 6 of the Act in order to develop the proposed project.

The Commission reaffirmed its view that only substantial alterations were contemplated by Section 6 of the Act in

its Order Denying Rehearing, 16 FERC ¶ 61,082 at p. 61,152 (1981). More recently, this Commission considered the matter at some length in *Calaveras County Water District*, Project No. 2409-001, 20 F.E.R.C. ¶ 61,031 at p. 61,058 (1982):

PG&E would consider any action that creates any adverse impact on the efficiencies of licensed facilities, or creates any monetary injury "worth having" as "substantial" and within the provisions of Section 6. Such an interpretation of Section 6 would inflate the rights of existing licensees far beyond any needs for protecting their investment or ensuring the continued operation of their projects and place them in a position to veto any proposal by other entities for the development of additional generating capacity in the vicinity of their licensed projects. Section 6 must be read in conjunction with the rest of Part I of the Act, including the Commission's duty under Section 10(a) to promote the comprehensive development of the Nation's water resources. To allow existing licensees to thwart all development of new capacity in the vicinity of their licensed projects that may in any way affect their projects would run counter to the entire thrust of Part I of the Federal Power Act.

Here, a Commission order requiring PP&L to coordinate would not alter PP&L's Swift and Yale licenses within the meaning of Section 6 of the Act. It would be merely directing PP&L to continue something it is already doing. There is no evidence in this record to support the proposition that there would be a diversion of significant water flows such that would cause an "alteration" as that term has been defined and applied in Commission cases. See also *Town of Madison Electric Works Dept.*, Project No. 2830 *et al.*, 11 F.,E.R.C. ¶ 61,318 (1980); and the Com-

mission's discussion of encroachment and relevant cases cited in *Susquehanna Power Company and Philadelphia Electric Power Company*, Project No. 405; *Philadelphia Electric Company*, Project No. 2355, 32 F.P.C. 826 at 831 (1964).

Second, PP&L itself raised the coordination issue in its evidence and argued it extensively on brief. Certainly, PP&L has had the opportunity to be heard on this matter. Whether PP&L is ordered to coordinate its Lewis River operations with those of JOA at Merwin in this docketed proceeding or through separate orders issued in its Yale and Swift project dockets or both is a matter of form, not of substance. The findings necessary to support a coordination order have been made here and they can be adopted in any order(s) ultimately issued to accomplish that end.

Further, while Article 18 refers to such "rules and regulations" as the commission may prescribe, that language cannot reasonably be construed to mean that such rules and regulations must be the product of formal rulemaking proceedings. Certainly, "reasonable rules and regulations" as they may apply to individual licensees subject to the Article 18 condition may be prescribed after formal adjudicatory proceedings where the issue has been joined and the licensee has been heard.

PP&L further argues that the Commission exceeded its authority under the Act when it included Article 18 in the Yale and Swift licenses (Reply Br. pp. 57-73). PP&L maintains that the Commission's authority to condition a license is limited by Sections 6 and 10(c) of the Act. The relevant portions of those sections are as follows:

Section 6

Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions,

if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license.

16 U.S.C. § 799.

Section 10(c)

[T]he licensee . . . shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property.

16 U.S.C. § 803(c).

PP&L asserts that the Commission's authority to condition is limited to matters affecting the "protection of life, health, and property" as prescribed in Section 10(c). PP&L further argues that while Section 6 of the Act grants broad conditioning authority, the conditions must be spelled out with sufficient specificity so that the licensee is informed of his obligations when the license is issued.

PP&L says that Article 18 attempts to expand the Section 10(c) language to say that:

[t]he operations of the licensee . . . shall at all times be controlled by such reasonable rules and regulations . . . as the Commission may prescribe . . . in the interest of the . . . utilization of such waters . . . for *other beneficial public uses, including recreational purposes*. . . . (Emphasis added).

PP&L argues that the underscored language is null and void because it exceeds the Commission's power to condition as expressed in Section 10(c) of the Act. PP&L concludes therefore that it could not be required to coordinate its operation for such purposes as recreation and fisheries management as recommended by staff or for any

purpose other than "the protection of life, health and property" (Reply Br. p. 69).

The judge finds that the inclusion of Article 18 in PP&L's Yale and Swift No. 1 licenses was a proper exercise of the Commission's authority under the Act.

First, Section 10(c)'s reference to "such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property" neither limits nor defines the extent of the Commission's authority to condition a license in the first instance. Section 10(c) constitutes a congressionally-imposed condition which becomes a part of every license. The Commission has no authority or discretion with respect to the inclusion of the Section 10(c) condition in every license. The same holds true for all other portions of Section 10 of the Act which become conditions of every license. Thus, the first sentence of Section 10 makes clear that "[a]ll licenses issued under this Part shall be on the following conditions. . . .

Section 10(g) of the Act, however, says that the Commission may require "[s]uch *other* conditions not inconsistent with the provisions of this Act" (Emphasis supplied). Similarly, Section 6 of the Act requires that every license must be conditioned upon the acceptance by the licensee of (1) the terms and conditions of the Act which include, of course, the condition related to the protection of life, health and property found in Section 10(c), and (2) "*such further* conditions as the Commission shall prescribe in conformity with this Act. . . ." (Emphasis supplied). Thus, there are two types of license conditions which the statute recognizes: those imposed by Congress in the Act itself and those which the Commission may establish in conformity with the Act.

The Commission's authority to condition a license in a manner which would affect the prospective operations of the licensee "for other beneficial public uses including,

recreational purposes" as described in Article 18 constitutes a means for assuring that the license as originally issued will remain, in the words of Section 10(a), the plan "best adapted . . . for other beneficial public purposes, including recreational purposes. . . ." The authority for the Commission to impose such a condition is implicit in the language of Section 10(a). *See, e. g., State of California v. FPC*, 345 F.2d 917, 923 *et seq.* (9th Cir. 1965); *PUD No. 1 of Snohomish County et al.*, Project No. 2157, 41 F.P.C. 108 (1969), affirming Initial Decision issued June 7, 1968, 41 F.P.C. 111 (1968); *Idaho Power Co.*, Project No. 2930-000, 19 F.E.R.C. ¶ 62,583 (1982), Order Denying Rehearing, 21 F.E.R.C. ¶ 61,181 (1982).

The Ninth Circuit in *State of California, supra*, further held that the test of the efficacy of a Commission action based on a license condition to be implemented in the future would be subject to review based on the sufficiency of the evidence to support such action (345 F.2d at 924):

We therefore conclude that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year. The likelihood that circumstances will occur during the next twenty years which will, in fact, present such a problem seem remote. The prospect that, if such circumstances do arise, the Commission will solve the problem in a manner which will deprive the district of essential irrigation requirements is speculative. Should such an eventuality come to pass, any such Commission action will be subject to review as to the sufficiency of the evidence to support findings upon which such action is based, and as to whether the action is arbitrary and capricious. But we now hold that the Commission has the legal authority to take appropriate action

restricting the use of such irrigation rights, should the occasion arise.

Similarly, the action taken herein in invoking as a condition Article 18 of PP&L's Yale and Swift NO. 1 licenses must be judged on the sufficiency of the evidence adduced in this proceeding.

The next question is whether Article 18 was explicit enough in light of the language of Section 6 of the Act which requires that all terms and conditions be expressed in the license. The answer is in the affirmative. The Ninth Circuit's decision in *State of California*, is again instructive (345 F.2d at 924-925):

The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' rights to test the validity of any future action taken.

The inclusion of Article 18 in the Yale and Swift No. 1 licenses represented nothing more than the Commission's recognition that in the future, the public interest may require changes in the licensee's operations "for other beneficial public uses, including recreational purposes." The record in this case shows that the "changes" herein ordered, *i. e.*, coordinated operations, compel PP&L to do no more than it is already doing, coordinating the oper-

ations of the three Lewis River reservoirs. In short, the Yale and Swift No. 1 licenses are not being "altered" by compelling PP&L to engage in coordinated operations with JOA. To the extent that PP&L must adjust its operations on the Lewis River to accommodate JOA as Merwin licensee, no evidence has been presented to show those changes would be of a magnitude affecting the viability of PP&L's continued operation under its Yale and Swift No. 1 licensee or the integrity of PP&L's Yale and Swift investments. Further, to the extent that JOA would benefit from PP&L's reservoirs at Yale and Swift, all parties agree that JOA would have the obligation under Section 10(f) of the Act to pay PP&L for headwater benefits (Ex. T-22 at 14-15; Ex. T-11 at 21-22 and Ex. T-41 at 12-13).

As correctly noted by PP&L in its Reply Brief, pp. 59-64, the statutory history of Section 6 makes clear that Congress' concern was that the Commission prescribe conditions in licenses with sufficient clarity and specificity so as to accurately apprise the prospective licensee of its responsibilities and liabilities under the license and to encourage the formation of private capital necessary to insure development of the nation's water resources.

As the Ninth Circuit observed, however, in *State of California*, 345 F.2d at 924, "[t]he section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application." This judge would further add that Section 6 should not be interpreted in such manner as to defeat the underlying principles and intent of Congress as expressed in other sections of the Act. But, PP&L's interpretation of Section 6 would do just that. It would effectively foreclose this Commission from carrying out its relicensing responsibilities in those instances where one party has two or more project licenses on the same river. The incumbent licensee could simply refuse to enter into coordinated operations with a competing applicant and thereby secure a renewal of its license.

Of course, PP&L's argument would apply with equal force to initial licensing proceedings. Initial licenses could not issue where present licenseholders on the same river refuse to coordinate their operations with a license applicant irrespective of the public interest which might be served by further development on that river. New project ownership on the same river would be effectively eliminated with development of new hydroelectric facilities on the river restricted to and monopolized by the present licensee(s).

The authority granted the Commission to fix the payment for headwater benefits in Section 10(f) of the Act is an express recognition by the Congress that there will be instances where new downstream projects being licensed or relicensed will benefit from upstream storage reservoirs. Rather than serving as a basis for the Commission refusing to issue a license (or relicense) where the owner of the upstream project objects to coordinated operations, the Congress specifically provided for the payment by the new downstream licensee for the benefits it would receive from the upstream reservoir(s).

Lastly, PP&L, by accepting the Article 18 condition in both its Yale and Swift No. 1 licenses, was apparently satisfied that the condition was sufficiently clear and specific so as to adequately apprise it of its responsibilities under the license, and to assure it of the safety of its investment. The implementation of those conditions by Commission orders directing coordinated operations with JOA will neither affect the security of PP&L investments in Yale and Swift No. 1 nor will it impair their existing operations.

In conclusion, PP&L's legal proof is found wanting. The Commission has the authority to order coordinated operations under Article 18 of the Yale and Swift No. 1 licenses.

XIII. Term of the License

The term of the new Merwin license shall be thirty years.

The Commission policy on the term of a new license issued in a relicensing case was stated most recently in *Escondido Mutual Water Company*, Project No. 176, *et al.* Opinion No. 36, 6 F.E.R.C. ¶ 61,189, 61,423 (February 26, 1979), *rehearing denied*, Opinion No. 36-A, 9 F.E.R.C. ¶ ———, (November 26, 1979), *reversed and remanded on other grounds Escondido Mutual Water Company v. FERC*, 692 F.2d 1223 (9th cir. 1982):

When a new license is issued pursuant to Section 15(a) of the Federal Power Act and there is no new investment in the licensed project works, it is the policy of the Commission to issue the license for a thirty-year term absent unusual circumstances or certain exceptions, rather than for the maximum fifty-year term authorized by Section 6. Substantial new investment, on the other hand, is an exception which has been held to justify a longer relicensing term. (Footnotes omitted.)

No new investment in Merwin has been proposed nor does any unusual circumstance or exception exist which would warrant a departure from the thirty year term provision contemplated by *Escondido* in situations such as these.

Staff argues that the expiration of the new Merwin license should coincide with the expiration of the Yale license on May 1, 2001. Staff's reasoning is faulty. First, it suggests that the simultaneous expiration of the Merwin and Yale licenses would somehow assist in coordination of the three Lewis River projects. These projects are presently operated on a coordinated basis, and they will continue to be operated on a coordinated basis after this decision. The Commission's authority to order coordinated

operations on the Lewis River exists and can be fully implemented immediately as a result of this decision without waiting for the expiration of the Yale license. See Section III, H, and XII of this decision. Moreover, what is gained by awaiting the expiration of the Yale license on May 1, 2001? Is it expected that the Commission would issue a five-year license for Yale and Merwin in the year 2001 to coincide with Swift's expiration date in the year 2006? For what purpose? The Commission has the authority to fulfill its statutory responsibilities in individual licensing cases by ordering coordinated operations without awaiting the expiration of all licenses on the Lewis River. Staff recognizes this authority when it argues that Article 18 of the Yale and Swift licenses could be invoked to require PP&L to coordinate its operations at those reservoirs with JOA's at Merwin. The cases cited by staff to support a shortened license term were cases in which the Commission issued twenty-eight-year licenses to three licensees to assure their licenses would expire coincident with a contiguous pumped storage project. Those cases all involved relicensing the original licensee and even then the twenty-eight-year term fell only two years short of the Commission policy stated in *Escondido*. If protracted litigation ensues after this decision then staff's recommended term provision, stated in terms of a May 1, 2001 license expiration date, will become much shorter.

The second reason staff gives for a shortened license period is "the uncertainty with respect to the long term economic consequences of selecting either JOA or PP&L as the new licensee" (Initial Br. p. 69). No further explanation or argument is made as to the meaning of this statement. Staff's second reason is rejected. As previously found, the specific economic impacts presented by the parties are beyond the scope of matters entrusted by the Congress to the Commission under Section 7(a) of the Act and thus are not factors which, under the Commission guidelines of Opinion No. 88, are applicable, relevant and

material to a determination of the broad public interest in the proceeding. Even if the economic impacts were relevant, the fact that the long-term economic consequences of relicensing Merwin cannot be forecasted with any reasonable degree of accuracy at this time is not something that can be cured by waiting eighteen years. In the year 2001 (when Merwin would be relicensed again under staff's proposal) fifty-year economic projections would not be any easier to make. As previously found, the long-term economic consequences of relicensing Merwin cannot be forecasted over a fifty-year period (or a thirty-year period) with any reasonable prospect of accuracy, not because of any particular defect in the method of analysis by any party, but because of the many variables and unknowns that will in the future impact on a fifty-year study and cannot be ascertained at this time.

Staff's third reason for a short license term is that it "would enhance the commission's flexibility to respond to future public needs" (Initial Br. p. 69). Again, staff does not elaborate. To what future public need is staff referring? Traditionally, as well as in this case, the license contains conditions covering all known present public need as well as specific license conditions which will enable the Commission to insure that the licensed project continues to be operated in a manner consistent with the purposes of the statute. *See, e.g.*, the discussion of Article 18, *supra*, the provisions of which are identical to Article 12 of the license hereinafter issued.

JOA argues that it should receive at least a forty-year license term. Its rationale is that its proposed financing plan supports this result; it must make substantial investments upon relicensing; and the proposed hatcheries and wildlife management plan will have a useful life closely coinciding with a forty-year term.

None of JOA's arguments constitutes sufficient grounds for deviating from the Commission's stated thirty-year pol-

icy. The Commission is willing to grant relicense terms in excess of thirty years to encourage new development at the existing project. Neither JOA or PP&L proposes any immediate new development at Merwin. Further, JOA's financing plan is not conditioned or contingent upon it receiving a license of any specific term. Last, life of a fisheries and management plan cannot be found to control the term of the license. There is simply no connection between the two.

XIV. Compensation

Section 15 of the Act provides that the Commission may "issue a new license . . . to a new licensee, which license . . . shall be issued on the condition that the new licensee shall, before taking possession of such project . . . pay such amount . . . as the United States is required to do, in the manner specified in Section 14. . . ."

16 U.S.C. § 808(a).

Section 14, in turn, defines the d"manner" of such payment in these terms:

[B]efore taking possession it [the United States] shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance there from of property taken . . . The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under

this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. . . .

16 U.S.C. § 807(a).

Thus, there are two components of the takeover price: net investment and severance damages.

A. Net Investment

The term "net investment" is defined in Section 3(13) of the Act, (16 U.S.C. § 796(13)), as follows:

"net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar cost of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created."

Simply stated, the formula provides that the net investment is equal to PP&L's original, or gross, investment in Merwin less accrued depreciation to the extent that it exceeds a fair return. While the formula has other elements, the controversy in this case centers on the items

of accrued depreciation and fair return. Although accounts other than depreciation are referred to in Section 3(13) as deductions from gross investment, no party suggests there are amounts in those accounts which would be subject to the net investment calculation.

As of June 30, 1982, the parties agree that PP&L's Merwin plant and depreciation accounts show the following:

Gross Plant	\$ 16,441,505
Depreciation Reserve	\$ <u>7,020,912</u>
Net Plant	\$ 9,420,593

These numbers are presented for illustrative purposes only. All parties agree that however "net investment" is defined, its calculation must be made at the time of takeover.

1. Position of the Parties

a. PP&L

PP&L argues that "fair return" as set forth in Section 3(13) of the Act should be construed to be those rates of return granted to PP&L by the various state commissions over the years of the Merwin lease. PP&L admits that its reasoning is purely practical (Initial Br. p. 67):

Unfortunately, we are not aware of any experts who are prepared to establish what a "fair return" in each of over 50 years would be. If the format of rate proceedings were followed, that testimony would likely analyze earnings of businesses of "comparable risk" in each year of the whole period. This would produce an enormous mass of testimony. In view of the known difficulty of getting "experts" to agree on what fair rates of return are under current market conditions, it seems unlikely that anything coherent would develop. Development of "fair return" by

a 50-year year-to-year analysis is neither practical, nor would it produce intelligible results.

PP&L further argues that over the life of the Merwin lease its earnings attributable to the project were \$9,205,122 less than the rates of return authorized by the various state Commissions. Because PP&L's "deficits" in relation to the state authorized returns exceeds PP&L's depreciation reserve of \$7 million, PP&L concludes that, at takeover, net investment would be its original investment plus additions less retirements with *no deduction for accumulated depreciation*. Based on PP&L's gross plant at June 30, 1982, its claimed net investment is \$16,441,505. This number, of course, would have to be updated to reflect additions and retirements up to the date of takeover.

PP&L calculated its earnings attributable to Merwin in its Initial Brief, page 71. PP&L explains that its earnings were based on system data contained in its Form 1 Annual Reports to this Commission. It assumes that each dollar of investment earns the same amount and therefore earnings are prorated to the project on the basis of the proportion of total system to project book investment in each year. PP&L's earnings were compared to the returns (earnings) authorized by the various state commissions for every year of the licenses and the resultant "excess" or "deficit" was recorded. PP&L reports the total deficit for the years 1932-1981 to be \$9.2 million, as previously noted.

✓ **b. JOA**

JOA would deduct the entire accumulated reserve for depreciation from PP&L's initial Merwin investment to arrive at net investment. Using JOA's approach, PP&L's net investment as of June 30, 1982 was \$9,420,593. This number, of course, would be updated to reflect the appropriate book amount at the time of takeover.

JOA agrees with PP&L that, as a practical matter, "fair return" should be deemed to be that allowed by the state commissions. JOA argues that PP&L should be held to have earned its state authorized return for purposes of computing net investment because of the change in accounting and ratemaking concepts since 1920. JOA explains that the reason for the statutory language requiring depreciation to be deducted from initial investment—but only to the extent that it exceeds a fair return—was in recognition of the fact that, in 1920, most state commissions did not allow depreciation to be recovered as an expense in rates. This meant that the depreciation reserve established pursuant to Section 10(c) of the Act did not represent recovery of PP&L's investment from its ratepayers. Under these circumstances, to insure that a licensee at takeover would receive its investment and still earn a fair return over the life of its investment, Congress required the depreciation reserve to be deducted from a licensee's initial investment—but only to the extent that it exceeded a fair return. After passage of the 1920 Act, JOA says, accounting and ratemaking practices changed. Depreciation was recognized as an expense to be borne by ratepayers and not a stockholder expense to be paid out of the otherwise "fair return." Once depreciation became recoverable through rates, the utility would not have its "fair return" diluted through depreciation charges. Thus, according to JOA, PP&L's authorized return could be deemed to be its "fair return" for purposes of calculating net investment.

c. Staff

Staff says that PP&L's earned return may be considered *prima facie* evidence of PP&L's "fair return" for purposes of calculating net investment. Staff argues that because regulators as a matter of law must establish a fair return, it is reasonable to assume that a utility, through efficient management, would earn that return (Reply Br. p. 28).

Staff agrees with JOA that the changes in accounting and ratemaking treatment of depreciation since 1920 make it imperative that the accumulated depreciation reserve be deducted from PP&L's initial Merwin investment. Staff recommends that the calculation of net investment await a final audit of PP&L's records as of the effective date of the order issuing the license (Reply Br. p. 31). Because of its view that PP&L's earned returns are *prima facie* evidence of its 'fair returns' staff proposes that the results of the "final" audit be open to challenge "[s]hould JOA or PP&L contest the accuracy of the audit or the *prima facie* fair return assumed for any year. . . ." and that "[i]n the event an objection is filed, the above provisions for payment and assumption of possession shall be suspended pending further order by the Commission" (Reply Br. p. 31).

2. Discussion

PP&L, JOA and staff agree that net investment must be calculated at the time of takeover.

Either PP&L's or JOA's proposals for ascertaining net investment, if adopted, would lay the matter to rest. PP&L would not deduct the accumulated depreciation reserve, while JOA would.

Staff's proposal to circulate the results of a Commission sponsored audit for the purpose of permitting challenges to the "*prima facie*" fair return assumed for any year is an invitation to endless litigation with no guidelines and no prospect of reaching a meaningful result. How does one prove that earned return is greater or less than a fair return for any or all of fifty years without first fixing the fair return and earned return for each of those years? PP&L highlighted some of the reasons it would be futile to undertake a study of fair return for fifty years (see page 52 *supra*). The task of ascertaining PP&L's earned return would be equally frustrating, as discussed later in connection with its proposal.

To define "fair return" in terms of earned returns as staff does, and then suggest that both fair returns and earned returns can be made subject to future debate and litigation, undercuts staff's principal thesis and sidesteps the very issue set for hearing. The Commission directed the judge to determine the net investment in this proceeding—a task which the statute says must be accomplished prior to transfer. Staff's proposal must, therefore, be rejected for failing to resolve the issue set for trial and for suggesting a course of action leading to protracted litigation with no reasonable prospect for success.

The judge will not presume, nor does the legislative history suggest, that the Congress in 1920 intended to devise a scheme for determining "net investment" so complex, open-ended and time-consuming as to defeat the very relicensing process it had established.

PP&L's fifty-year earnings study is not supported by any evidence or sponsored by any witness, and was presented for the first time on brief. Besides its evidentiary failing, the study is of no value because it attempts to compare and reconcile book-reported earnings with state-authorized returns as if the two were synonymous. However, it is quite obvious that any similarity between the two is purely coincidental.

It is a well-settled regulatory principle that the appropriate treatment of costs and revenues for ratemaking purposes may differ from the accounting treatment per books. See, e.g., *Democratic Central Committee of the district of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786, 819 (D.C. Cir. 1973), cert. den. 415 U.S. 935 (1974); *Farmers Union Central Exchange v. Federal Energy Regulatory Commission*, 584 F.2d 408, 418 (D.C. Cir. 1978), cert. den. 439 U.S. 995 (1978). Reasons for the difference between earned returns and state authorized returns may include, for example, regulatory policies regarding the treatment of construction work in

progress, consolidated taxes, tax normalization and non-recurring expenses to name a few. Any attempt to determine whether an authorized return was realized would require a reconstruction of PP&L's earnings for each of fifty years. The state ratemaking techniques and policies in effect for each of those years would be applied to adjust PP&L's reported book earnings up or down to account for any differences in ratemaking treatment and book treatment of all costs and revenues items comprising PP&L's earnings. This would be tantamount to setting fifty rate cases for hearing for each state served by PP&L. Hearings would be required, because it is unlikely that experts could agree to the proper application of state regulatory policies to a given set of facts—assuming that state policy could be identified in the first instance.

Furthermore, PP&L's study shows that it earned less than the state-authorized return in forty-eight out of fifty years. To accept these results as PP&L's "true deficits" associated with Merwin makes PP&L's vigorous pursuit of the new license inscrutable. Because its study assumes an investment dollar contributes an equal share to any "deficit" or "surplus," an assumption not shown to be unreasonable, PP&L also implies that in forty-eight out of its last fifty years the company failed to earn a fair return on a system-wide basis.

PP&L cites no legislative history which would suggest that Congress intended the Commission to undertake the mammoth and most likely hopeless search for a licensee's "real" earnings over a fifty-year period which PP&L's studies would engender. Of course, to its credit, PP&L recommends no such such undertaking. PP&L relies on its studies to support its net investment figure and, for the reasons previously given, those studies must be rejected.

The congressional intent evident throughout the legislative history of Section 3(13) of the Act was to insure that, at takeover, the original licensee would recover its

investment dollars p'us a fair return on that investment. Mr. O.C. Merrill, Chief Engineer of the Forest Service, Department of Agriculture—recognized by the parties and the courts as one of the leading draftsmen, authorities and participants in the legislative process culminating in the 1920 Act—described the concept of net investment in testimony before the Congress:

Whatever money goes into a project of this kind has to come back from some source. It either has to come back in a capital sum or it has to come back in earnings. We provide that it shall come back, if the Government takes it over, as a capital sum reduced by the amount that has been retired through earnings. In my judgment, this is the fairest basis that would be employed from the standpoint of proper protection of the money that goes in, and from the standpoint of protecting the public as users of power and as rate payers from being obliged to pay more for the property at the termination than was actually and honestly put into it.

* * *

... the price to be paid is to be the cost of the property, diminished by so much as the licensee may be able during the period of the license to write off his investment from earnings in excess of a fair return.

Hearings Before the Committee on Water Power, 65th Cong. 2d. Sess., Mar. 18 - May 15, 1918, p. 39. (U.S. Congress, House Cmтт. on Water Power, Wash. D.C. Government Printing Office, 1919.)

What is "fair return": JOA and PP&L rely on state commission authorized returns as the "fair return." This appears consistent with the Act's recognition that the licensee's rates would be subject to state regulation with

only contingent authority left to this Commission in those instances where the state did not regulate. *See* Sections 19 and 20 of the Act. The crucial role of state regulation in carrying out the overall purpose of the Act was apparent in the following exchange between Secretary of the Interior Lane and Congressman Taylor of Colorado:

Mr. Taylor. We should preserve the principle of absolutely holding this property and having a clean right of recapture at the end of 50 years. When we do that and reserve absolutely beyond any question the right of the various public utility commissions to regulate the rates and the service, it seems to me that everything else is a minor detail, is it not?

Secretary Lane. Yes; I should say those were the two outstanding things, that those were the pillars upon which the whole proposition rests.

Hearings before House Committee on Water Power, 65th Cong., 2d Sess., Mar. 18 - May 15, 1918, p. 463.

Thus, congressional recognition of stated regulation of the licensee's rates (and in its absence, federal regulation) was one of the cornerstones of the entire legislation. Any attempt to redefine "fair return" in a retrospective fashion to fifty years of operating history based on present "experts'" notions of "fair return" would not only be futile, as PP&L correctly observes, but would represent federal oversight and intrusion into an area which the 1920 statute specifically reserved for the states. Moreover, to the extent that a licensee's rates are subject to federal regulation, there is no suggestion in the legislative history that congress intended this Commission on relicensing to pass judgment on the "fair return" determinations of previous Commissions.

There remains the question of what Congress meant when it said that, at takeover, the initial investment would

be returned to the original licensee less accumulated depreciation charges *but only to the extent that those charges exceeded the "fair return"*. All parties agree that at about the time the 1920 legislation was under consideration by the Congress, the accounting and ratemaking treatment of depreciation was markedly different than it was just a few years later (JOA Initial Br. pp. 102-104, Staff Reply Br. pp. 22-24 and PP&L Initial Br. pp. 63-65). For rate-making purposes, depreciation was *not* treated as an expense to be recovered through rates. As Secretary of Interior Lane explained in a letter to Representative Ferris of Oklahoma, "most State public-utility commissions are not likely to permit rates to be charged in an amount sufficient, after paying interest, to amortize the cost of the original project. . . ." Ellen Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act*, Vol. II. at 515-516, U.S. Federal Power Commission (FPC Library, October, 1966). Unable to recover its investment as a return of capital through rates, to the extent depreciation was taken, it had to be taken out of the utility's "fair return." To guarantee a licensee, at takeover, a fair return on its investment over the life of its license plus the recovery of its gross investment not recovered through rates, the language of Section 3(13) makes perfect sense. Shortly after the Act's passage, and prior to the date Merwin was placed in service, depreciation was routinely allowed as a non-cash expense chargeable to ratepayers. Thus, the recovery of a licensee's gross investment was assured through rates during the term of the license and, to the extent that the gross investment was not fully restored, the new licensee would be required to pay the balance.

Adoption of PP&L's position, which permits no depreciation deduction, allows PP&L a double recovery of investment—first, through the recoupment of depreciation expenses through its rates and second, through the recovery of those same charges in calculating net invest-

ment. As previously noted, no evidence has been adduced by PP&L to show that it failed to earn its "fair return," nor does the statute or legislative history dictate that this Commission embark on the laborious, costly and time-squandering course of determining whether PP&L's earnings were greater than or less than the fair return established over a period of fifty years by various state regulatory authorities.

Several arguments raised by PP&L in opposition to the depreciation reserve deduction must also be addressed. PP&L argues that the depreciation charges must be in a funded account before they can be deducted from gross investment (Initial Br. pp. 65-66). Neither the statute nor legislative history refers to such a requirement. Section 3(13) does not describe depreciation in terms of a cash or non-cash account, but merely requires a deduction from gross investment of the "aggregate credit balance of current depreciation accounts." Further, to speak of a funded account, as opposed to a non-funded account, loses sight of the congressional objective to assure the original licensee the return of its gross investment to the extent not already recovered through earnings.

PP&L claims that "[d]epreciation cannot be said to be taken out of "earnings," [and therefore in excess of a "fair return"] since it comes out before earnings are determined" (Initial Br. p. 65). This is merely a semantical exercise which again fails to reconcile with the congressional theme that, upon takeover, a licensee would be returned its original investment to the degree not already recovered from ratepayers.

Based on all the foregoing, it is found that PP&L's net investment should be calculated based on its gross plant investment in Merwin as recorded on its books as of the date of takeover (*i.e.* the date the license transfer is effective) less the accumulated depreciation attributable to Merwin on that date.

B. Severance Damages

1. Positions of the Parties

PP&L asserts that it is entitled to recover as severance damages the cost of providing substitute power to replace power lost as a result of the takeover by JOA of Merwin and that such severance damages amount to not less than \$740,600,000, and not more than \$832,350,000.

JOA contends that PP&L is not entitled to any severance damages if JOA receives the Merwin license, because there will be no injury to any of PP&L's property "not taken" as part of the project.

Staff agrees with JOA, stating that severance damages constitute compensation for the former licensee's investment, less junk value, in electric utility property not taken but rendered totally useless by severance from the property taken. Staff asserts that no PP&L property would be rendered totally useless by a JOA takeover of Merwin.

2. Discussion

PP&L supports its claim for severance damages with the common law of condemnation of utility properties. PP&L asserts that awarding the Merwin license to JOA would constitute a partial taking of PP&L's system, and "[i]n the case of a partial taking of a utility, the 'property' involved is the whole system of the utility—not just a tract of land. A taking of any part of that system, whether it be distribution properties or a generation plant, is a *partial* taking, and severance damage is measured by the increased costs to the remaining system." (PP&L Initial Br. p. 92).

This proceeding is not a common law condemnation case but rather, a relicensing proceeding taking place under the aegis of a federal statute which specifically sets the compensation to be paid a licensee at the expiration of its license when it is not renewed. Only if the taking of the project *prior* to license expiration were involved would

condemnation concepts come into play and compensation would then be determined by a court of competent jurisdiction. (*See proviso* clause of Section 14(a)).

The applicable portion of Section 14(a) of the Act provides for "such reasonable damages, if any, to the property of the licensee not taken, as may be caused by the severance therefrom of property taken..." 16 U.S.C. § 807(a).

Alternative power costs do not measure damages to PP&L's remaining ("not taken") property; they measure, at most, the effect on PP&L's customers *i.e.*, the increased costs which those customers may be required to pay in future rates. Further, the taking of Merwin does no damage to PP&L's remaining property. PP&L will still retain full ownership, use and enjoyment of that property. It will be fully able to recover through rates to its customers its increased fuel costs, its investment in such property and a reasonable return on that investment, no less after the taking of Merwin than before. *See Bluefield Water Works and Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923).

PP&L argues that the legislative history supports its view of severance damages. The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed statement of legislative intent to the contrary, the language of the statute will be deemed controlling. *See Consumer Products Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980) and *United States v. Turkette*, 452 U.S. 576, 581 (1981). In this instance, the language of the statute is clear—damages must be to the *property not taken* caused by the severance therefrom of property taken. As previously found, there is no damage to PP&L's other properties by the issuance of the Merwin license to JOA. Resort to the legislative history in this case, while unnecessary as a matter of law, serves only to confirm that PP&L claim for severance damages is

without merit. In his January 27, 1920, memorandum to the Conference Committee upon which PP&L relies in part, Mr. Merrill specifically rejected the proposition that Section 14 would allow as damages the alternative costs to replace lost power:

Under the provisions of Section 14 a licensee can make claim under severance damages for only such "reasonable damages *to the property not taken* as may be caused by the severance therefrom of property taken." It is not intended to cover damage to his business, or damage to his future prospects. Nevertheless, it seems desirable to define or limit the damages claimed. A licensee should not be allowed, for example, to claim as severance damages the extra amount which it might cost to construct a new plant in place of the one taken. (Emphasis in original).

Under these circumstances, PP&L is not entitled to any severance damages and its claim is therefore denied.

ULTIMATE FINDINGS AND CONCLUSIONS

Upon the record in this proceeding it is found and concluded:

1. Pacific Power & Light Company, original licensee and applicant for a new license for the existing Merwin hydroelectric project in Project No. 935, is a corporation organized under the laws of the State of Maine; is duly qualified to do business in the States of Washington, Oregon, California, Idaho, Montana and Wyoming; and has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a licensee for the project.
2. Clark-Cowlitz Joint Operating authority, applicant for a new license for the existing Merwin hydroelectric project in Project No. 2791, is an operating agency and municipal

corporation organized under the laws of the State of Washington; has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of a license for the project; and is a "municipality" within the meaning of Section 3(7) of the Federal Power Act.

3. Public notice of the applications has been given. The applications in Project No. 935 and Project No. 2791 are competitive and mutually exclusive; and neither the Commission nor any other Federal department or agency has recommended that the United States exercise its right to take over the project.

4. Pacific Power & Light company has submitted satisfactory evidence of its financial ability to continue to maintain and operate the project.

5. Clark-Cowlitz Joint Operating Authority has submitted satisfactory evidence of its financial ability to take over, maintain and operate the project.

6. The project does not affect a government dam, nor will issuance of a license, as hereinafter provided, affect the development of any water resources for public purposes which should be undertaken by the United States.

7. The project is located upon navigable waters and lands of the United States.

8. The issuance of a license for the project, as hereinafter provided, will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands.

9. Subject to the terms and conditions hereinafter imposed, the project will be best adapted to a comprehensive plan for improving or developing the Lewis River for the use and benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreation.

10. The plans of Pacific Power & Light Company in Project No. 935 and Clark-Cowlitz Joint Operating Authority in Project No. 2791 are equally well adapted to conserve and utilize in the public interest the water resources of the region; preference shall therefore be given, pursuant to Section 7(a) of the Act, to the application of Clark-Cowlitz Joint Operating Authority; and a license for the project should be issued to said municipality, as hereinafter provided.

11. The installed horsepower capacity of the project hereinafter authorized for the purpose of computing the administrative annual charge is 182,00 horsepower.

12. The United States is entitled to be recompensed by the licensee for the use, occupancy and enjoyment of 138.18 acres of its lands included in the project.

13. Pacific Power & Light Company's net investment in the project to be taken over by Clark-Cowlitz Joint Operating Authority pursuant to the license hereinafter issued will not exceed the fair value of the property taken, and Pacific Power & Light Company will not suffer any damage to its property not taken caused by the severance therefrom of the property taken pursuant to the license hereinafter issued.

14. PP&L's net investment shall be calculated on the basis of its gross plant in the Merwin project as recorded on its books as of the date of takeover (the date the license transfer is effective) less accumulated depreciation attributable to the Merwin project on that date.

15. There should be deleted from the project maps and description attached as Exhibits J and M to the application in No. 2791 the following transmission facilities, which facilities are not "primary lines" and thus not part of a "project" within the meaning of Section 3(11) of the Act:

- (a) the 115-kv transmission line extending about 23.36 miles south of the Merwin switchyard to the dead

end tower on the north bank of the Columbia River;

- (b) the 115-kv transmission line extending about 15.92 miles northwest of the Merwin switchyard to the BPA transmission line at Cardwell Substation near Kalama, Washington.

16. It is necessary and appropriate that the proposed orders in Project No. 2071 and Project No. 2111 contained in Appendices C and D hereto, respectively, shall issue and become effective on the date that the order in the instant proceeding in Project No. 2791 is final.

WHEREFORE, *It is ordered*, subject to review by the Commission on appeal, or on its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) This license is hereby issued to Clark-Cowlitz Joint Operating Authority under Section 4(e) of the Federal Power Act, for a term of thirty years, commencing 180 days from the date of issuance of this order, for the take-over, operation and maintenance of Merwin Project No. 2791, located on the Lewis River in Clark and Cowlitz Counties, Washington, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) The Merwin Project No. 2791 consists of:

(1) all lands, to the extent of the Licensee's interests in those lands, constituting the project area and enclosed by the project boundary, the project area and boundary being shown and described by certain exhibits which form part of the application for license and which are designated and described as:

EXHIBIT	FERC No. 2791-	SHOWING
J-1	6	General Map

J-2	7	General Map Transmission Clark County
J-3	8	General Map Transmission Cowlitz County
K-1	9	Detail Map
K-2	10	Detail Map
K-3	11	Detail Map
K-4	12	Detail Map
K-5	13	Detail Map
K-6	14	Detail Map
K-7	15	Detail Map
K-8	16	Detail Map
K-9	17	Detail Map
K-10	18	Detail Map
K-11	19	Detail Map
K-12	20	Detail Map
K-13	21	Detail Map
K-14	22	Detail Map
K-15	23	Detail Map

(2) Project works consisting of:

- a) A concrete arch dam, 313 feet high above its foundation, having an arch length of 728 feet and total crest of 1,250 feet, with four taintor gates 39 feet wide and 30 feet high and one taintor gate 10 feet wide and 30 feet high;
- (b) A 4,040-acre reservoir, 14.5 miles long, with a gross storage capacity of 422,800 acre-feet and a total usable storage capacity of 264,000 acre-feet between normal maximum water surface elevation 239.6 feet and minimum water service elevation 165.0 feet;
- (c) Four penstocks 15.5 feet in diameter located within the dam; three are 150 feet long and presently in use and each contains a 17-foot diameter butterfly valve located at the downstream face of the dam; the fourth penstock is available for future extension and use;
- (d) A powerhouse, semi-outdoor type, constructed of concrete, and containing three units each connected

to a vertical-shaft reaction turbine rated at 61,500 hp and a semi-outdoor, umbrella type generator rated at 45,000 kw. The powerhouse also contains a 1,00 kw station service generator, bringing the total rated capacity to 136,000 kw;

- (e) Nine single-phase 13.8/115 kv transformers;
- (f) Three approximately 900-foot-long, 115 kv transmission lines terminating at the Merwin Substation bus;
- (g) Two recreational facilities on the Merwin Reservoir, Merwin Park and Speelyai Bay Park;
- (h) Fish facilities consisting of fish collection and trapping equipment at Merwin powerhouse and fish hauling equipment;
- (i) and all other facilities and interests appurtenant to the operation of the project, which are generally shown and described by the following exhibits;

EXHIBIT	FERC NO. 2791-	SHOWING
L-1	24	General Plan & Sections
L-2	25	Powerhouse Plan & Sections
L-3	26	Spillway Plan & Sections
L-4	27	Non Overflow Section & Thrust Block Elevations & Sections

Exhibit M—Consisting of three pages of text, entitled "General Description of Mechanical, Electrical, and Transmission Equipment and Appurtenances," filed March 17, 1978.

(3) All of the structures, fixtures, equipment, or facilities used or useful in the maintenance and operation of the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the

Commission; together with all riparian or other rights, the use or possession of which are necessary or appropriate in the maintenance of the project.

(C) This license is also subject to the terms and conditions set forth in Form L-3 (Revised October, 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States" which terms and conditions designated as Articles 1 through 28, published at 54 F.P.C. 1817, are incorporated herein by reference and made a part hereof, and subject to the following special conditions set forth herein as additional articles:

Article 29. Prior to commencement of any construction or development of any project works or other facilities at the project, the Licensee shall consult and cooperate with the State Historic Preservation Officer (SHOP) to determine the need for, and extent of, any archeological or historic resource surveys and any mitigative measures that may be necessary. The Licensee shall provide funds in a reasonable amount of such activity. If any previously unrecorded archeological or historic sites are discovered during the course of construction, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with SHOP to develop a mitigation plan for the protection of significant archeological or historic resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historic work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 30. The Licensee shall consult and cooperate with the U.S. Fish and Wildlife Service, Washington State Departments of Game, Ecology and Fisheries, the U.S. National Marine Fisheries Service, and the National Park

Service of the Department of the Interior, and other appropriate agencies for the protection and development of the environmental resources and values of the project area. The Commission reserves the right to require changes in the project works or operations that may be necessary to protect and enhance those resources and values.

Article 31. The Licensee shall pay the United States the following annual charges, effective the first day of the month in which the term of this license commences:

- (a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 182,000 horsepower.
- (b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of 138.18 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 32. In cooperation with the Washington State Department of Ecology, and in compliance with federal, state, and local regulations, the Licensee shall plan and provide for the collection, storage, and disposal of solid wastes generated through public use of project lands and waters, and, within one year from the date of issuance of this order, shall file with the Commission a solid waste management plan that has been approved by the Washington State Department of Ecology. This plan shall include: (a) the location of solid waste receptacles to be provided at public use areas, including campgrounds, picnicking areas, and similar areas; (b) schedules for collection from those receptacles; (c) provisions for including in the plan any additional public use areas as they are developed;

and (d) the locations of disposal sites and methods of disposal.

Article 33. (a) In accordance with the provisions of this article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of and non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee

shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State and local health and safety requirements. Before granting permission for the construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modifications of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kv or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No

later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approval have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least seventy-five feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than fifty total acres of project lands for each project development are conveyed under this clause (d) (7) in any calendar year. At least forty-five days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity

of any Federal or State agency official consulted, and any federal or State approvals required for the proposed use. Unless the Director, within forty-five days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of

the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude the land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 34. The Licensee shall negotiate an agreement with Pacific Power & Light Company, the Federal Emergency Management Agency and the U.S. Army Corps of Engineers to establish a flood control rule curve and operating procedures of the Merwin Project. The flood control agreement shall be filed for Commission approval. Pending negotiation and approval of the flood control agreement, the Licensee shall operate Merwin Reservoir so as to provide 20,000 acre-feet of flood control from November through March of each year. Operation of this flood control storage shall be coordinated with 50,000 acre-feet or more of flood control storage provided at the upstream Yale and Swift No. 1 reservoirs to minimize the discharge of flood waters below the Merwin project.

Article 35. The Licensee shall coordinate the hydraulic and electrical operations of the Merwin Hydroelectric Project with those of the upstream Yale and Swift No. 1 and Swift No. 2 Hydroelectric Projects so as to maximize the

total production of electrical capacity and energy from all of the Lewis River hydroelectric plants while meeting the obligations of the Licensee and the licensees of said upstream hydroelectric projects for flood control and for regulation of discharges from the Merwin project.

Article 36. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within 180 days from the date of issuance of this order, a PMP study for the Lewis River at Merwin Dam. The study shall incorporate the estimates of Probable Maximum Precipitation as appropriate from the U.S. Weather Bureau Hydrometeorological Report No. 43. The study as submitted shall include sufficient data to permit an independent evaluation of all assumptions and parameters including, but not limited to: PMP values and precipitation losses and excesses for each sub-area of the watershed in the controlling PMP and its accompanying sequential storm; calibration of the runoff and stream course models with historic floods; the reservoir levels at the beginning of the PMP inflow and the reservoir rule curve and operation manual followed in routing the PMP.

Article 37. The Licensee shall submit for approval of the Director, Office of Electric Power Regulation, within eighteen months from the date of issuance of this order, a structural evaluation of the arch, thrust block, spillway, and non-overflow sections of Merwin Dam under normal operating, Probable Maximum Flood and Maximum Credible Earthquake loading conditions. The study as submitted shall include all parameters, assumptions, and physical properties used in the analysis in order to permit an independent evaluation by FERC staff.

Article 38. The Licensee shall consult with the National Park Service of the U.S. Department of the Interior, the Washington Interagency Committee for Outdoor Recreation, the Washington State Parks and Recreation Commission and other appropriate agencies and entities to

develop a plan for optimum public utilization of the project recreational resources, and shall, within one year from the date of issuance of this order, file with the Commission for approval a revised Report on Recreational Resources for Project No. 2791, conforming to Section 4.51(f)(5) of the Commission's Regulations. The report shall include a drawing showing project recreational facilities relative to the project boundary.

Article 39. The Licensee shall, in cooperation with the U.S. Fish and Wildlife Service and the Washington Department of Game, develop a mutually satisfactory wildlife mitigation plan for the Merwin Project. Further, within one year from the date of issuance of this order, Licensee shall file with the Commission for approval, the plan along with an implementation schedule, cost estimate and proposals for monitoring the success of the wildlife habitat enhancement measures. Agency letters of comments on the plan must be included in this filing.

Article 40. The Merwin Project will be operated to provide regulation of discharges from the Lewis River system of reservoirs and plants as follows:

Part I. December 8 to March 1

- A. Minimum flow of 1,500 cfs will be maintained.
- B. Merwin power plant may be loaded at a rate that will cause the water to rise gradually but will not exceed one (1) foot per hour as measured at the USGS Ariel gage located about 1/2 mile below the Merwin powerhouse. Unloading the Merwin power plant will be gradual but will not exceed one and one-half (1-1/2) feet per hour stage change at the Ariel gage.

Part II. March 1 through May 31 (refilling period)

- A. When the March 1 forecast indicates the runoff volume at Merwin during March, April and May

will be equal to or more than 460,000 DSF, then the minimum flow will be 2,700 cfs. If the March 1 forecast is for a total runoff of less than 460,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 460,000 DSF and a minimum flow of 1,000 cfs if the volume runoff forecast is for 340,000 DSf. At no time will the minimum flow below Merwin be less than 1,000 cfs in March.

- B. When the April 1 forecast indicates the runoff volume at Merwin during April and May will be equal to or more than 340,000 DSF, then the minimum flow will be 2,700 cfs. If the April 1 forecast is for a total runoff of less than 340,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast is for 340,000 DSf and a minimum flow of 1,300 cfs if the volume runoff forecast is for 270,000 DSF. At no time will the minimum flow below Merwin be less than 1,300 cfs in April.
- C. When the May 1 forecast indicates the runoff volume at Merwin during may will be equal to or more than 175,000 DSf, then the minimum flow will be 2,700 cfs. If the May 1 forecast is for a total runoff of less than 175,000 DSF, then the minimum flow will be computed by a straight-line interpolation between a minimum flow of 2,700 cfs if the volume runoff forecast if for 175,000 DSF and a minimum flow of 1,650 cfs if the volume runoff forecast is for 145,000 DSF. At no time will the minimum flow below Merwin be less than 1,650 cfs in May.
- D. In establishing the flow levels between March 1 and May 31, four major data sources will be ex-

amined: (1) forecast of the runoff volume; (2) actual runoff being experienced; (3) load demands on the Lewis River power system; and (4) reservoir contents.

Part III. June and July Operation

During these months a minimum flow at Merwin of 2,500 cfs for June, 2,000 cfs from July 1-15 and 1,500 cfs from July 16-31, will be maintained as long as natural flow at Merwin is equal to or greater than 2,000 cfs in June, 1,600 cfs from July 1-15, and 1,400 cfs from July 16-31. When the natural flow is less than these amounts, the minimum flow at Merwin will be equal to the natural flow, except that at no time will the minimum flow be less than 1,650 cfs in June, and 1,200 cfs in July.

Part IV. Plateau Operation (Mach 1 - July 31)

- A. The period of plateau operation may be modified if the need (abundance of fish) so indicates, as determined jointly by the Washington Departments of Fisheries and Game and the Mervin licensee.
- B. Daily fluctuation in flows below Merwin will be restricted by providing flow plateaus (periods of near-steady discharge). Each plateau will be of as long a duration as possible when in effect, but flow plateaus can be changed as a result of changes in natural flow or power demand on the Lewis River power system. Reductions in the number of generating units on the line during the period of plateau operation will be held to as few as possible, with a target level of no more than twelve during this period.

- C. In changing a flow plateau on the rising stage, the Merwin plant may be loaded to provide a gradual rise as measured at the USGS gage of not more than one (1) foot per hour. On the falling stage the following limitations prevail: (a) for plateau operation of flows above 6,000 cfs the fall should be at a gradual rate of not more than 750 cfs per hour; (b) for plateau operation above 3,000 cfs but less than 6,000 cfs the fall should be at a gradual rate of not more than 500 cfs per hour; (c) for plateau operation for flows below 3,000 cfs the fall should be at a gradual rate not to exceed 300 cfs per hour, and limited to only one change in any 24-hour period.

Part V. August 1 through October 1

- A. Minimum flow of 1,200 cfs will be maintained.
B. Same as "B" of Part I.

Part VI. October 16 through December 7

- A. During the period October 16 through October 31, the minimum flow will be 2,700 cfs.
B. During the period November 1 through November 15, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 4,200 cfs.
C. During the period November 16 through December 7, the minimum flow will be the lesser of: (1) natural flow at Merwin plus 2,000 cfs from storage; or (2) 5,400 cfs.
D. The minimum flow requirements of Part VI. C. will be terminated at an earlier date by the Washington Department of Fisheries if salmon spawning or other conditions—so warrant, and if such termination is requested by the Merwin licensee.

E. Same as "B" of Part I.

Part VII.

- A. As used herein, the term "natural flow" shall mean, on any day, the average of the natural flow of the Lewis River at Merwin during an immediately preceeding three-day period.
- B. It is expected that from time to time temporary modification of the above regulations may be warranted. Such changes would be made if mutually agreed to by the Merwin licensee, the State of Washington Departments of Fisheries and Game and the National Marine Fisheries Service.
- C. Nothing in this article shall constrain the Merwin licensee from taking action to respond to emergency conditions, including mechanical failure, transmission line failure, floods beyond control, landslides, volcanic activity, or acts of God. At the conclusion of the emergency condition, said licensee will return to an operation schedule in compliance with this Article.
- D. Biological and in-stream flow studies necessary to determine the flow requirements of the Lewis River for the enhancement of the fishery resource below Merwin Dam are incomplete as of November 1982. When such studies are complete, or by December 31, 1984, this Article shall be reviewed by the Washington Departments of Fisheries and Game together with the Merwin licensee to determine whether or not any modification should be made to the flow regulation below Merwin in the interest of more closely matching such flow regulation to the respective needs of the fishery resource, recreation and power.

Prior to implementing the flow regime and no later than 180 days from the date of issuance of this order, Licensee

shall negotiate with Pacific Power & Light company and file with the Commission an agreement to ensure the availability of storage from the Swift No. 1 and Yale reservoirs to implement the flow regime agreed to. Such agreement shall provide for compensation to Pacific Power & Light Company for the portion of such support properly allocable to the Merwin Project. In the event of disagreement, Licensee shall file its proposal, along with Pacific Power & Light Company's comments, for resolution by the Commission.

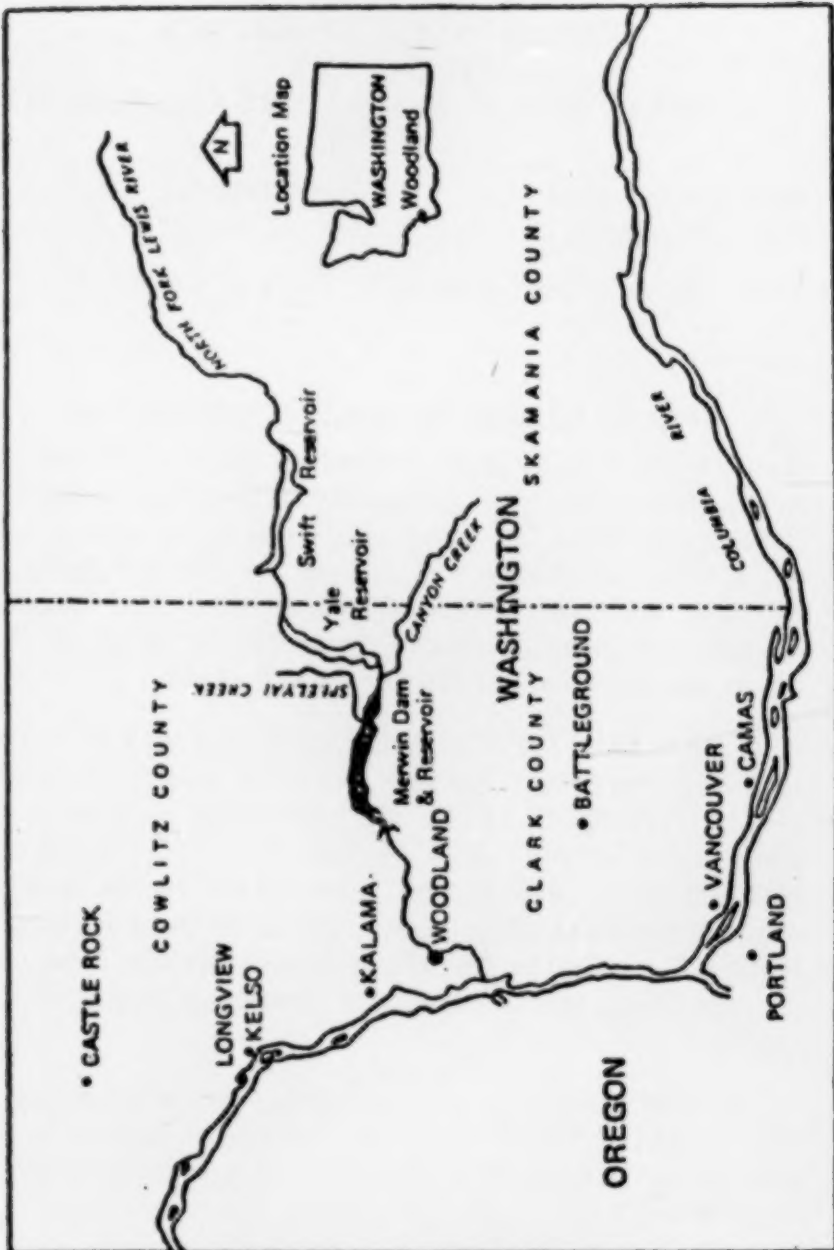
Article 41. The Licensee shall negotiate with the State of Washington Department of Fisheries and Game to reach an agreement on the Licensee's share of responsibility for the mitigation through artificial propagation of project impacts on fish resources. The Licensee shall report within one year of the date of issuance of this order on the results of these negotiations and shall file for Commission approval at that time either the executed agreement or, in the absence of such agreement, the Licensee's proposal along with the comments of the Washington State Departments of Fisheries and Game.

(D) The exhibits designated and described in paragraph (B) above are hereby approved as part of this license to the extent consistent with the findings and order herein; and to the extent inconsistent with such findings and order, the Licensee shall substitute revised, conforming exhibits which substitute exhibits will be a part of this license.

(E) The Licensee shall, within thirty days of the date this order becomes final, submit to the Commission its acceptance in writing of all the provisions, terms and conditions of this license, which acceptance shall be a part of this license.

Jon G. Lotis
Administrative Law Judge

APPENDIX A (Source: Item E)



LOCATION OF LAKE MERWIN

APPENDIX B

Page 1 of 6

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

CLARK-COWLITZ JOINT) PROJECT NO. 2791
OPERATING AGENCY)
)
PACIFIC POWER & LIGHT COMPANY) PROJECT NO. 935

PROPOSED PREHEARING STIPULATIONS

On November 5, 1981, a prehearing conference was held in the above-captioned competitive relicensing proceeding. Procedural; dates for, *inter alia*, filing of testimony were set at that conference and counsel for the competing relicensing applicants indicated at that time their intention to seek possible stipulations prior to the filing of their direct testimony scheduled for May 3, 1982.

The PACIFIC POWER & LIGHT COMPANY (PACIFIC or PP&L) and the CLARK-COWLITZ JOINT OPERATING AUTHORITY (JOA), the competing relicensing applicants for the MERWIN PROJECT, FERC Project Nos. 935 and 2791, respectively, have agreed to the attached stipulations which they believe will serve the ends of eliminating the need to formally evidence certain issues and of expediting resolution of the remaining issues in contention.

PACIFIC and JOA are submitting the stipulations for the review of FERC Staff and all other parties to this proceeding and hereby invite them to join in the attached stipulations.

Respectfully submitted,

April 26, 1982
Date

Hugh Smith
HUGH SMITH,
Counsel for PP&L

April 22, 1982
Date

Chris Williams
CHRIS WILLIAMS,
Counsel for JOA

APPENDIX B**STIPULATIONS****AGREED TO BY PACIFIC POWER & LIGHT COMPANY
AND CLARK-COWLITZ JOINT OPERATING AGENCY
CONCERNING THE MERWIN PROJECT RELICENSING
PROCEEDING**

The Pacific Power & Light Company, the relicense applicant for Project No. 935 and Clark-Cowlitz Joint Operating Agency, the competing relicense applicant for Project No. 2791, hereby agree to the following stipulations:

1. Clark-Cowlitz Joint Operating Agency (CCJOA) is a duly created and validly existing municipal corporation organized under the laws of the State of Washington by Public Utility District No. 1 of Clark County and Public Utility District No. 1 of Cowlitz County which provide electric service in Clark County and Cowlitz County, respectively.

2. Pacific Power & Light Company (Pacific) is a duly created and validly existing corporation organized under the laws of the State of Maine providing electric service in portions of the states of Washington, Oregon, Wyoming, California, Montana and Idaho.

3. The Merwin Project (Project) produces approximately 136 MW of capacity and 560,000 MWH of average annual energy.

4. Clark County PUD and Cowlitz County PUD are entitled to preference in purchasing power from the Bonneville Power Administration pursuant to Section 4(a) of the Bonneville Project Act, 16 U.S.C. 832(a). Pacific is not entitled to preference under said Act.

5. Pacific is entitled to the equivalent of preference in the purchase and exchange of power from the Bonneville Power Administration for its residential and small farm

loads within the Bonneville service are pursuant to Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 P.L. 96-501 (Regional Act). The rate for such purchases under Section 7(b) of the Act is the same rate under which BPA sells to its preference customers. Purchases from BPA, if any, for Pacific commercial and industrial customers would be at a higher rate under Section 7(f).

6. Pacific has and CCJOA either has or can acquire the necessary staff and work force to manage, operate, maintain and carry out all responsibilities of Project ownership.

7. Both Pacific and CCJOA can use all the firm power output of the Project to meet their customers' loads and use or otherwise dispose of any surplus power which may from time to time be approved by the project.

8. The existing facilities of the Project, including but not limited to the dam, reservoir, powerhouse, switchyard, Project lands, and recreation and fish facilities, are substantially as described in Exhibit F, J, K, L and M of the applications.

9. The transmission facilities as described in the respective applications are correct; CCJOA does not include in its application the section of line between the North side of the Columbia River and St. John's Switching Station.

10. Issuance of the license to Pacific or CCJOA will not impair existing natural, historic, or scenic values in the Project area.

11. Regardless of ownership, the water rights would either stay with Pacific or, after appropriate proceedings by the State of Washington, be transferred to the CCJOA depending upon the outcome of this relicensing proceeding.

12. CCJOA is not presently a member of either the Northwest Power Pool or the Pacific Northwest Coordi-

nation Agreement. Cowlitz County PUD is, however, a member of the Pacific Northwest Coordination Agreement. Regardless of present affiliation, CCJOA, or Cowlitz County PUD as the designated operating utility, would operate the Project in the Northwest Power Pool under the Pacific Northwest Coordination Agreement in coordination with other projects on the Lewis River and in conformity with any operating conditions imposed by FERC or other applicable regulations.

13. Decisions by Pacific or CCJCA (sic) regarding any future expansion or new development in the Lewis River Basin would be made in light of each utility's need for generation after considering the affect of the Northwest Power Pool, the Pacific Northwest Coordination Agreement and the Regional Act.

14. The Project has been routinely inspected by FERC staff inspectors and by independent consulting engineers with the result that the Project continues to being a safe and structurally sound condition. There is no evidence that the Project could not continue to operate in a safe and adequate manner for the next 50-year license period.

April 2, 1982
Date

Hugh Smith
HUGH SMITH, Counsel for
Pacific Power & Light Com-
pany

April 1, 1982
Date

Christopher D. Williams
Christopher D. Williams,
Counsel for
Clark-Cowlitz Joint Operat-
ing Agency

Agreed to and joined in by Commission Staff on ___ day of ___, 1982.

DONALD H. CLARKE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Portland, Oregon, this 27th day of April, 1982.

Hugh Smith
HUGH SMITH

APPENDIX C

Pacific Power & Light Company) Project No. 2071
(Yale Hydroelectric
Project)

**ORDER DIRECTING COORDINATION OF THE YALE
HYDROELECTRIC
PROJECT WITH THE MERWIN HYDROELECTRIC
PROJECT**

Pursuant to Article 18 of the terms and conditions of Pacific Power & Light Company's (PP&L) hydroelectric project license No. 2071 issued April 24, 1951, (the Yale hydroelectric project), PP&L is hereby directed to coordinate its Yale project operations with those of the Clark-Cowlitz Joint Operating Agency at the Merwin hydroelectric project, license No. 2791. Coordination shall be for such purposes, reasons, and in the manner set forth in the Initial Decision issued April _____, 1983 in the competitive relicensing proceeding, *Pacific Power & Light Company*, Project No. 935 and *Clark-Cowlitz Joint Operating Agency*, Project No. 2791, which Initial Decision is incorporated herein by reference.

APPENDIX D

Pacific Power & Light Company) Project No. 2111
(Swift No. 1
hydroelectric Project)

**ORDER DIRECTING COORDINATION OF THE SWIFT
NO. 1**

**HYDROELECTRIC PROJECT WITH THE MERWIN
HYDROELECTRIC PROJECT**

Pursuant to Article 18 of the terms and conditions of Pacific Power & Light company's (PP&L) hydroelectric project license No. 2111 issued October 29, 1956 (the Swift No. 1 hydroelectric project), PP&L is hereby directed to coordinate its Swift No. 1 project operations with those of the Clark-Cowlitz Joint Operating Agency at the Merwin hydroelectric project, license No. 2791. Coordination shall be for such purposes, reasons, and in the manner set forth in the Initial Decision issued April _____, 1983 in the competitive relicensing proceeding, *Pacific Power & Light Company*, Project No. 935 and *Clark-Cowlitz Joint Operating Agency*, Project No. 2791, which Initial Decision is incorporated herein by reference.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7641.

ALABAMA POWER COMPANY, *et al.*, *Petitioners*,
versus
FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

United States Court of Appeals
Eleventh Circuit

FILED
NOV. 12, 1982

NORMAN E. ZOLLER
CLERK

Petition For Review Of An Order Of The Federal Energy
Regulatory Commission

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

(Opinion September 17, 1982, 11 Cir., 198__, __ F.2d __).

(November 12, 1982)

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 26), the suggestion for Rehearing En Banc is
DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 80-7461

D.C. Docket No.
EL 78-43, ER 78-43
88 (80-2083 & 80-2275 Consol. in D.C.)
(80-1865 & 80-1871 Consol. in D.C.)

ALABAMA POWER COMPANY, UTAH POWER & LIGHT COMPANY,
PACIFIC GAS & ELECTRIC COMPANY, THE MONTANA POWER COM-
PANY, WISCONSIN POWER & LIGHT COMPANY, and PACIFIC POW-
ER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**Petitions For Review Of An Order Of
The Federal Energy Regulatory Commission**

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Alabama Power Company, Utah Power & Light Company, Pacific Gas & Electric Company, the Montana Power Company, Wisconsin Power Company and Pacific Power & Light Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission is AFFIRMED.

September 17, 1982

ISSUED AS MANDATE: DEC 06 1982

United States Court of Appeals,
Eleventh Circuit.

Sept. 17, 1982

No. 80-7641.

ALABAMA POWER COMPANY, Utah Power & Light Company,
Pacific Gas & Electric Company, the Montana Power Com-
pany, Wisconsin Power & Light Company, and Pacific Power
& Light Company, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

Petitions for Review of an Order of the Federal Energy
Regulatory Commission.

Before RONEY, TJOFLAT and HATCHETT, Circuit
Judges.

HATCHETT, Circuit Judge:

We are faced with a purely legal question regarding the
statutory construction of section 7(a) of the Federal Power Act
(Act), 16 U.S.C.A. § 800(a) (West 1974). We affirm the deci-
sion of the Federal Energy Regulatory Commission.

I. BACKGROUND

The Federal Power Act, 16 U.S.C.A. § 791a et seq. (West
1974), authorizes the Federal Energy Regulatory Commission
(once known as the Federal Power Commission) to license
public and private entities for the purpose of developing water
power projects.¹ Licensees may develop these projects on wa-

¹ A "water power project" includes all facilities needed to harness
the energy of flowing water to produce turbine generated electric
energy.

ters over which the United States has jurisdiction, and may operate the projects for profit. A license is granted for a term of up to fifty years, at the expiration of which the United States may recover the project for its use or issue a new license to the same or a new entity. If the Commission grants a new entity a license, compensation must be paid to the original licensee for its "net investment" plus "severance damages."² This case involves a contest among potential licensees, including the present license holder, for a new license and presents the question of the preference due a municipal applicant.

² The term net investment is defined at 16 U.S.C.A. § 796 (1974) to mean:

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission. . . .

The term "severance damages" is explained in 16 U.S.C.A. § 807 as follows:

(a) . . . [B]efore taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the

Section 7(a) of the Act provides in pertinent part: "... in issuing new licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted,"³ Section 15(a) also states that: "... the Commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license

licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Chapter by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. . . .

³ Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) provides:

Sec. 7. [As Amended August 26, 1935 and August 3, 1968.] In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted*, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800(a)] [Emphasis added.]

under said terms and conditions *to a new licensee, . . .*" (Emphasis added).⁴

The petitioners are thirty-eight privately owned utility companies licensed by the Commission to operate water projects.⁵ The intervenors are publicly owned utilities that support the Commission's ruling.⁶

The competitors in this case are the City of Bountiful, Utah, a municipality, and Utah Power & Light Company, a private utility. Both entities applied for a license to operate the hydro-

⁴Section 15 of the Federal Power Act provides:

Sec. 15. [*As amended August 3, 1968.*] (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof. . . , the commission is authorized to *issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in section 14 hereof . . . : *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

⁵The thirty-eight privately owned utility companies have categorized themselves for purposes of this case into three groups: the hydroelectric utility company group; Pacific Gas & Electric Co.; and Utah Power & Light Co., Montana Power Co., and Wisconsin Power & Light Co.

⁶The publicly owned utilities that have intervened to support the Commission's opinion are: the American Public Power Association; the City of Bountiful, Utah; the City of Santa Clara, California; and the Clark-Cowlitz Joint Operating Agency, Washington.

electric project operated by the private utility (Utah Power & Light) under a license which expired several years ago. The City of Bountiful, during the license contest, asked the Commission for a declaratory ruling clarifying its entitlement to the statutory preference in section 7(a). The Commission consolidated Bountiful's petition with that of another municipality that also sought a declaration of preference and initiated proceedings to resolve the issue.

Since only declaratory relief was requested, the Commission considered, as does this court, the issue to be one of statutory construction. The Commission issued two opinions on this matter. In its opinion and order declaring municipal preference applicable to hydroelectric relicensings, *City of Bountiful, Utah* (Opinion No. 88), No. EL78-43 (F.E.R.C. June 27, 1980), the Commission held:

[T]he preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources.

The Commission found that the preference to states and municipalities only applied where the plans submitted by the states or municipalities were as "equally well adapted" as the plans submitted by citizens or corporations. In essence, the Commission held that the preference given to states and municipalities by section 7(a) of the Federal Power Act always applies regardless of the identity of the parties competing for reissuance of a license. The Commission stated, however, that a state or municipality would gain the benefits of this preference only in a "tie-breaker" situation. The Commission subsequently denied rehearing, *City of Bountiful, Utah* (Opinion 88-A), No. EL78-43 (F.E.R.C. June 27, 1980 [sic]), and petitioners brought this appeal.

II. JURISDICTION

At the outset, we are faced with a jurisdictional question. Although all parties to this proceeding urge us to reach the merits, we cannot do so if we lack the power to act because the issue is not ripe for judicial review. Since the Commission only ruled in a declaratory fashion, we must determine whether this case is ripe for review in the absence of a final ruling on a particular license application. The Commission has not granted a license to any of the parties to this proceeding, and since the rule announced by the Commission only applies in a "tie-breaker" situation, it is arguable that the ruling herein may never concretely affect any of these parties. Courts are reluctant to apply declaratory judgments to administrative determinations "unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). In explaining the ripeness doctrine, the Supreme Court stated that its basic rationale was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" 387 U.S. at 148, 87 S.Ct. at 1515. The Court also stated that the ripeness doctrine protects administrative agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49, 87 S.Ct. at 1515-16. The *Abbott* Court endorsed a two-step approach for analyzing ripeness which requires that we "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515.

The Supreme Court set forth four important factors to be used in making this evaluation. The four factors are:

- (1) whether the issues presented are purely legal;
- (2) whether the challenged agency action constitutes "final agency action," within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 704 (West 1977);

(3) whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and

(4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

Pennzoil Co. v. FERC, 645 F.2d 394, 398 (5th Cir. 1981), (quoting *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18). A complete recitation of the factors supporting our conclusion is unnecessary. After full consideration, we find that the issue presented is purely legal, that the challenged agency action will have a direct and immediate impact upon the petitioners, the states, and all potential applicants, as well as the workload of the Commission. We further conclude that resolution of this issue now will foster effective enforcement and administration by the agency. The issue is ripe for judicial review. Having resolved this jurisdictional issue, we turn to the merits.

III. MUNICIPAL PREFERENCES: "NEW" v. "ORIGINAL" LICENSES

Petitioners contend that when Congress provided in section 7(a) of the Federal Power Act, 16 U.S.C.A. § 800(a) (West 1974), that the Commission give a relicensing preference to states and municipalities "in issuing licenses to new licensees under section 15 hereof," it intended the preference to be given to "new licensees" as defined in section 15, 16 U.S.C.A. § 808 (West 1974). They further posit that section 15 distinguishes the term "new licensee" from the phrase "original licensee." Because Congress clearly differentiated between the two terms, petitioners argue that it could not have intended the words "new licensee" to include the holder of the expired license. Thus, petitioners assert that the relicensing preference in section 7(a) is inapplicable to original licensees, but applies only to applicants seeking to acquire the project for the first time. The petitioners contend that the Commission clearly erred in interpreting section 7(a) because it necessarily concluded that Congress meant "any" when it said "new" in the Act.

We must determine whether in issuing licenses to new licensees under section 15 of the Act the Commission must apply a preference in favor of municipalities and states against all competing applicants or whether the preference applies only when the competing applicants are persons or entities other than the original licensee.

Section 7(a) provides a preference for states and municipalities in three situations:

- (1) In issuing preliminary permits;
- (2) in issuing licenses where no permit has been issued;
and
- (3) in issuing licenses to new licensees under section 15.

We are concerned only with the third situation. The petitioners urge that we apply the plain meaning of the words "new licensees," as defined in the statute. They contend that the Commission erred in relying on the legislative history of the term "new licensees" cautioning that legislative history is relevant only if the term has no plain meaning. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

We agree with petitioners that statutory interpretation must begin with the language of the statute which must be interpreted in accordance with its "plain meaning." *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982); *United States v. Anderes*, 661 F.2d 404 (11th Cir. 1981). We should depart from the official text of the statute and seek extrinsic aid for ascertaining its meaning only if the language is unclear or if apparent clarity leads to absurd results when applied. *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982). On the other hand, a reviewing court generally should adhere to the construction of a statute made by the agency charged with its execution unless there are compelling reasons indicating such construction is wrong. *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981). In *United States v. American Trucking Association, Inc.*, 310 U.S. 534,

60 S.Ct. 1059, 84 L.Ed. 1345 (1940), the Supreme Court emphasized that where the plain meaning leads to results that are absurd or at variance with the policy of the enactment, a reviewing court may seek guidance wherever available. The Court stated:

When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted).

Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

The Commission must act in each of the three licensing situations outlined above. As to all three, the Act clearly gives two different preferences. First, the Act gives a preference to states and municipalities when their plans are "as equally well adapted" as those of a private applicant. Second, the Act gives a preference as between applicants other than states and municipalities for plans best "adapted to develop, conserve, and utilize in the public interest the water resources of the region." These preferences cover all situations concerning competing applications. To follow the petitioners' theory of a "limited preference" in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a "limited preference" advantages incumbent licensees and thus leads to an

absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference.

In finding that the state and municipal preference applies to all cases, the Commission properly relied heavily upon legislative history because the plain meaning advanced by petitioners leads to absurd results. The evidence on which the Commission relied included:

(1) A memorandum which was used in preparation of the Act, written on October 31, 1917 by Mr. O. C. Merrill, conceded by all parties to be an authority;⁷

⁷ Among the materials relied on by the Commission was a memorandum written on October 31, 1917, by O. C. Merrill, which explained the objectives of the municipal preference. The memo, in pertinent part, provided:

Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. *In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions.* These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy.

(2) testimony of witnesses for power companies before congressional committees;^a

(3) the fact that the House-Senate Conference Committee rejected a bill proposed by the Senate, which contained a different preference from that under examination, and the fact that the conference committee accepted the House bill which provided the present preference;

^aThe Commission also relied upon testimony before the House Special Committee where a witness for private industry supporting the bill stated: (Hall is the witness.)

MR. CANDLER. Now then you do understand that under this bill the Government of course has the first right to retake the property?

MR. HALL. Yes, sir.

MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?

MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

MR. CANDLER. *Then the original licensee would have only the third opportunity to count on his lease.*

MR. HALL. *That is the way I understand it. . . .* [Emphasis added.]

The Commission also relied on a conversation between a member of the House Committee and the Secretary of the Interior at Special Committee Hearings. That colloquy was:

Mr. Hamilton. Mr. Secretary, I understood you to say that as between the original licensee and another, assuming there is a licensee who is a bidder at the end of 50 years, as between him and the other bidder, you would give the preference to the original licensee?

Secretary Lane. At the same figure.

Mr. Hamilton. Would you give that preference to the original licensee, assuming that the other bidder was a municipality?

Secretary Lane. I do not think I would.

(4) correspondence between persons interested in the bill such as Gifford Pinchot, President of the National Conservation Association, and writings of O. C. Merrill.⁹

Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.

We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation. The Supreme Court has announced

⁹The Commission also relied upon a letter of Gifford Pinchot, President of the National Conservation Association, to the Chairman of the Committee on Commerce, which stated, in part:

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof," or words of like import.

Letter from Gifford Pinchot to Senator Jones (June 25, 1919), reprinted in *City of Bountiful, Utah*, slip op. at 28.

Section 7 of the bill was then changed to include the Pinchot language.

In the development of water power by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.

The Commission also relied upon the writings of O. C. Merrill, who shortly before the President signed the bill, explained the preference section as follows:

For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

Memorandum from O. C. Merrill to President Wilson (June 8 or 9, 1920), reprinted in *City of Bountiful, Utah*, slip op. at 31.

the rule that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" *CBS, Inc. v. FCC*, 453 U.S. 367, 382, 101 S.Ct. 2813, 2823, 69 L.Ed.2d 706, 720 (1981). The Fifth Circuit has also applied this principle in reviewing FERC decisions. *Falcon Petroleum v. FERC*, 642 F.2d 780, 783 n.3 (5th Cir. 1981). We are aware of petitioner's assertion that the Commission has inconsistently interpreted section 7(a), but dismiss this argument as insubstantial and speculative. The statutory interpretation urged by petitioners is outweighed by Commission interpretations, even if inconsistent, not based upon activities contemporaneous with passage of the statute.

CONCLUSION

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 88-A
Docket No. EL78-43

CITY OF BOUNTIFUL, UTAH
UTAH POWER AND LIGHT COMPANY
CITY OF SANTA CLARA, CALIFORNIA
PACIFIC GAS AND ELECTRIC COMPANY

Issued: August 21, 1980

ORDER DENYING REHEARING

Before Commissioners: CHARLES B. CURTIS, Chairman;
GEORGIANA SHELDON, and GEORGE R. HALL.

On June 27, 1980, the Commission issued Opinion No. 88 in this proceeding for a declaratory order. There we determined that the preference in Section 7(a) of the Federal Power Act for states and municipalities is applicable against a non-state, non-municipal original licensee in a competitive relicensing proceeding, if the state or municipal applicant's plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region."¹ The members of the Hydroelectric Utility Company Group,² Carolina Power and Light Company, Montana Power Company, Pacific Gas and Electric Company, Utah Power and Light Company, and Wisconsin Power and Light Company have filed applications for rehearing urging us to vacate our order and reverse our determination. The "Public Power Parties", comprising the Cities of Santa Clara, California, and Bountiful, Utah, the Clark-Cowlitz Joint Operating Agency, and the American Public Power Association, have jointly filed an application for rehearing requesting that we delete from Opinion No. 88 the explication of the public interest standard that we must apply

¹ 16 U.S.C. § 800(a) (1976).

² See Opinion No. 88 (issued June 27, 1980) (*mimeo* at [22a] n.14).

to decide, in any particular relicensing proceeding, whether a state's or municipality's plans are "equally well adapted".

The private power interests do not raise any new theories in their applications for rehearing. They argue in more detail about the background and legislative history of the Federal Water Power Act. The Commission has reviewed the arguments of the parties on the meaning of the legislative history as those arguments have been made initially and expanded upon in the various applications for rehearing.

As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

In light of all of the available evidence of the legislative intent, we concluded that the interpretation more consistent with the purposes of the statute is that the state/municipal preference is applicable against a "private" original licensee in relicensing competitions if the state's or municipality's plans are "equally well adapted", and we are not persuaded to change that conclusion. In addition, we find no merit in the rehearing application of the "Public Power Parties." Accordingly, we shall deny rehearing.

The Commission Orders:

The applications for rehearing submitted in this Docket No. EL78-43 are denied.

By the Commission. Chairman Curtis voted present.

(S E A L)

/s/ KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 88

City of Bountiful, Utah)
Utah Power and Light Company) Docket No. EL78-43
City of Santa Clara, California)
Pacific Gas and Electric Company)

**OPINION AND ORDER DECLARING
MUNICIPAL PREFERENCE APPLICABLE
TO HYDRO-ELECTRIC RELICENSINGS**

Issued: June 27, 1980

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

MUNICIPAL PREFERENCE

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr.,
and George R. Hall.

City of Bountiful, Utah)	
Utah Power and Light Company)	Docket No. EL78-43
City of Santa Clara, California)	
Pacific Gas and Electric Company)	

OPINION NO. 88

**OPINION AND ORDER DECLARING
MUNICIPAL PREFERENCE APPLICABLE
TO HYDRO-ELECTRIC RELICENSINGS**

(Issued: June 27, 1980)

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INTRODUCTION

On June 10, 1920, President Wilson signed the Federal Water Power Act (FWPA), terminating a controversy between private power interests and conservationists that was equal in many respects to the recent and current controversies involving our nation's other energy resources. That Act created the Federal Power Commission and authorized it, among other matters, to issue licenses not exceeding 50 years for the development of our nation's water power resources. The first paragraph of Section 7 of the FWPA directed the Commission¹ to give preference to applications of "States"² and "Municipalities"³ in certain situations. Although President Wilson's signature terminated the one controversy, at least for the time being, it initiated the principal controversy in this proceeding—whether that State and municipal preference applies in a relicensing proceeding against a licensee that has

¹ The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

² The term "State" was defined in Section 3 of the FWPA and is defined in Section 3(6) of the Federal Power Act to mean "a State admitted to the Union, the District of Columbia, and any organized Territory of the United States".

³ The term "Municipality" was defined in Section 3 of the FWPA and the term "municipality" is defined in Section 3(7) of the Federal Power Act to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power".

applied for a successor license and is not itself a State or municipality.⁴

The significance of that controversy is essentially one of the cost to States and municipalities of acquiring generating capacity, and the correlative cost to citizens and corporations of losing generating capacity. The proviso of Section 14(a) of the Federal Power Act (FPA), which was also embodied in Section 14 of the FWPA, states,

That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation

⁴Section 4(e) of the Federal Power Act, which was Section 4(d) of the FWPA, authorizes the Commission to issue licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality. . . ." The term "Corporation" was defined in Section 3 of the FWPA to mean

a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

That term was modified in 1935 to include other forms of business organization and, therefore, the term "corporation" is defined in Section 3(3) of the Federal Power Act to mean

any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined . . .

In the context of Section 4(e) which authorizes the Commission to issue licenses to (1) citizens (including throughout this Opinion and order associations of citizens), (2) domestic corporations, (3) States and (4) municipalities, the issue is whether the State and municipal preference applies in a relicensing proceeding against a citizen or corporation licensee-applicant.

proceedings upon payment of just compensation is hereby expressly reserved.

Accordingly, States and municipalities can acquire licensed projects for public purposes pursuant to their right of eminent domain whenever they are willing to pay the *value-related* price which is constitutionally known as "just compensation". But, to the extent that States and municipalities have a right upon relicensing to acquire projects that were previously licensed to citizens and corporations, they would be able to acquire licensed projects at those times whenever they are willing to pay the *cost-related* price which is embodied in the "net investment" concept of the FPA. That concept refers essentially to the cost of the project, reduced by the recovery of that cost through earnings (principally in the form of accumulated depreciation) in excess of a fair return, during the term of the previous license. That price could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

The first paragraph of Section 7 of the FWPA was reenacted in 1935 with one substantive change⁵ as Section 7(a) of the FPA.⁶ For convenience, and since there is no material substantive difference between the two provisions, the present

⁵ The "equally well adapted" and "best adapted" standards were modified to eliminate the words "navigation and" preceeding "water resources of the region". The modifications are not material to this proceeding because, as discussed *infra*, no factual issues pertaining to specific projects are to be resolved.

⁶ Section 7(a) of the FPA as so enacted reads,

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the

designation, "Section 7(a)", is sometimes used herein to refer to the first paragraph of Section 7 of the FWPA in contexts prior to August 26, 1935, as well as to Section 7(a) of the FPA in contexts on and after that date.

Since the vast majority of initial licenses under the two Acts were issued for the maximum term of 50 years, the Commission has had only one occasion to consider the applicability of the municipal preference⁷ in a contested proceeding in which an investor owned utility, or private power interest⁸, had applied for a successor license. In that case, Carolina Power & Light Company (Carolina Power), the licensee of the Walters Hydroelectric Development, Project No. 432, applied on August 7, 1973, for a new license for that project; and North Carolina Electric Membership Corporation (NCEMC) applied a year later on August 20, 1974, for an essentially identical license for the same project.⁹ An administrative law judge decided, first,

region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

⁷ The term "municipal preference" will refer to the first preference of Section 7(a) to applications of States and municipalities, and should be distinguished from the second or "best adapted" preference of Section 7(a), "between other applicants".

⁸ State and municipal units for developing electric power are sometimes called "public power" in a collective context, and investor owned utilities are sometimes called "private power" in contradistinction. Accordingly, this controversy over the applicability of the municipal preference in relicensing situations is said to be one between public and private power interests. Cooperatives are part of "private power" in this context because they are not included within the definitions of "State" and "municipality".

⁹ NCEMC's application was designated Project No. 2748, which was simply the assignment of a docket number. The new number did not signify a different "project", or unit of improvement or development, within the meaning of Section 3(11) of the FPA.

that NCEMC was not a "State" or "municipality" and could not therefore qualify for the municipal preference, and second, that the municipal preference is restricted "to situations where the original licensee does not seek renewal". In Opinion No. 757, issued March 22, 1976, the Commission affirmed his ruling that NCEMC could not qualify for the municipal preference and said that in view of that decision it would not be appropriate to address the applicability of the municipal preference at this time:

This issue should be addressed in a proceeding where there are parties who will be affected by the application of the preference issue.¹⁰

At the time of the Commission's decision, the City of Bountiful, Utah (Bountiful), a municipality, and Utah Power and Light Company (UP&L), a corporation, had pending applications under Section 15(a) of the FPA for a new license for UP&L's Weber River Project (UP&L's Project No. 1744 and

¹⁰ The Commission has applied Section 7(a) in one other relicensing decision. Escondido Mutual Water Company, a not-for-profit corporation controlled by the City of Escondido, California, applied on April 1, 1971, for a new license for Project No. 176, which application was adopted by the City of Escondido as its own on November 25, 1975. Although five Bands of Mission Indians claimed that they were entitled to the municipal preference, the Commission found (Opinion No. 36, issued February 26, 1979, mimeo, at 74, n. 105) that they were not "municipalities" and, consequently, it did not reach the preference issue (mimeo, at 81 and 206). The Commission declined to issue a power or non-power license to the five Bands, and issued a new license to Escondido Mutual Water Company (a corporation), the City of Escondido (a municipality) and Vista Irrigation District (another municipality), as joint licensees, without otherwise reaching the preference issue. The Commission said (mimeo, at 81),

Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

Bountiful's Project No. 2747). Similarly, the City of Santa Clara, California (Santa Clara), another municipality, and Pacific Gas and Electric Company (PG&E), another corporation, had pending applications for a new license for PG&E's Mokelumne River Project (PG&E's Project No. 137 and Santa Clara's Project No. 2745). On July 21, 1978, more than two years after the Commission's decision on Carolina Power's Walters Hydroelectric Development, Bountiful filed a petition requesting the Commission to issue a declaratory order that it is entitled by Section 7(a) to a preference against UP&L when the Commission issues a new license for the Weber River Project. And on August 15, 1978, Santa Clara similarly filed a petition for a declaratory order that it is entitled to such a preference against PG&E when the Commission issues a new license for the Mokelumne River Project. The Commission, on September 27, 1978, issued notice of the filing of the two petitions and their consolidation under Docket No. EL78-43.

Petitions to intervene in support of Bountiful (I)(R) and Santa Clara (I)(R) were filed by The American Public Power Association (I)(R)¹¹, Clark-Cowlitz Joint Operating Agency (I)(R)¹², Northern California Power Agency¹³ and the City of Shawano, Wisconsin. In addition, petitions to intervene in support of UP&L (I) and PG&E (I)(R) were filed by PP&L, Carolina Power (I)(R), The Montana Power Company (I)(R),

¹¹ The American Public Power Association (APPA) is a national service organization of more than 1,400 consumer-owned utilities, including municipalities, State power authorities and districts, cooperatives and others.

¹² The Clark-Cowlitz Joint Operating Agency (JOA) is a municipality that was established in 1976 to compete for Pacific Power & Light Company's (PP&L's) Merwin Project (PP&L's Project No. 935 and JOA's Project No. 2791).

¹³ Northern California Power Agency is a joint action entity consisting of the municipalities of Alamenda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, California.

Wisconsin Power and Light Company (I), Georgia Power Company, Niagara Mohawk Power Corporation, the International Brotherhood of Electrical Workers (IBEW) and the Hydro-electric Utility Company Group (I)(R).¹⁴ A notice of intervention was also filed by The People of the State of California and the Public Utilities Commission of the State of California. All of the foregoing subsequently were permitted to participate in the proceeding. On May 3, 1979, the Commission

¹⁴ The Hydro-electric Utility Company Group (Hydro Group) is an *ad hoc* group of the following 34 electric utility companies associated for the purpose of this proceeding:

Virginia Electric & Power Company
 Alabama Power Company
 Minnesota Power & Light Company
 Southern California Edison Company
 Public Service Electric & Gas Company
 Appalachian Power Company
 Pennsylvania Power & Light Company
 Baltimore Gas & Electric Company
 Washington Water Power Company
 Jersey Central Power & Light Company
 Pennsylvania Electric Company
 York Haven Power Company
 Cardina Power & Light Company
 New England Power Company
 Georgia Power Company
 Duke Power Company
 Niagara Mohawk Power Corporation
 Northern States Power Company
 Union Electric Company
 Central Maine Power Company
 Idaho Power Company
 Wisconsin Electric Power Company
 New York State Electric and Gas Corporation
 Louisville Gas & Electric Company
 Connecticut Light & Power Company
 Hartford Electric Company
 Western Massachusetts Electric Company
 Holyoke Water Power Company

fixed a briefing schedule and the participants designated by "(I)" and "(R)", together with the Commission staff counsel, filed initial and reply briefs, respectively. In addition, the IBEW submitted a statement.

In our order of May 3, 1979, we indicated that our inquiry in this proceeding into the Section 7(a) municipal preference would be limited to two purely legal issues of statutory construction, as follows:

- (1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing proceeding under section 15 of the Act against an original licensee that is neither a state nor a municipality?
- (2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

We indicated, additionally, that we would *not* decide any factual issues under Section 7(a) pertaining to specific projects, such as whether a particular applicant's plans are (or within a reasonable time are made) as well adapted as another's plans to "conserve and utilize in the public interest the water resources of the region", and in particular that we would not decide whether Bountiful or Santa Clara is entitled to the municipal preference, if it is applicable. We said that their entitlement should be resolved in the separate relicensing proceedings in which they are parties. In view of the importance and complexity of the issues, we scheduled them for oral argument on February 22, 1980.

South Carolina Electric & Gas Company
 Arkansas Power & Light Company
 Public Service Company of Indiana
 Puget Sound Power & Light Company
 Portland General Electric Company
 Pacific Power & Light Company

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

Having considered the briefs and the oral argument of February 22, 1980, we have concluded and declare, for the reasons discussed herein, that the preference of Section 7(a) of the FPA favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. We have also concluded and declare that States and municipalities are entitled to a preference only when the Commission determines, in the exercise of its judgment, that their plans, and any competing plans of citizens or corporations for the same water resources, are equally well adapted to conserve and utilize in the public interest the water resources of the region.

THE "NEW LICENSEES" CONTROVERSY

The controversy in this proceeding focuses on the meaning of the words "new licensees" in the phrase "in issuing licenses to new licensees under section 15 hereof". The public power interests and the Commission staff counsel contend that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license) and, therefore, that a *new licensee* plainly is *any licensee* under a new license. In other words, the *new licensee* might be the licensee under the original or annual license, or any citizen, corporation, State or municipality that was a stranger to the original license and is eligible under Section 4 to become a licensee. Under their interpretation, in issuing new licenses under Section 15 to *any*

applicant for a license, the Commission is directed by Section 7(a) to give preference to States and municipalities, subject to a finding of equally well adapted plans.¹⁵

The private power interests do not dispute the contention that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license). But they contend that Section 15(a) carefully distinguishes between new licenses that are issued to "original licensees" and new licenses that are issued to "new licensees"¹⁶ and, there-

¹⁵ Santa Clara reads Section 7(a) as though it states,

. . . . in ~~issuing~~ determining whether to issue licenses to new licensees under section 15 hereof. . . .

As discussed *infra*, under APPLICABILITY OF SECTION 7(a) TO RELICENSINGS - Plain Meaning, the words "original" and "new" were used in Section 15 of the FWPA and are used in Section 15(a) of the FPA as correlative terms to describe a predecessor/successor relationship in a context of successive license terms. In that context, a "new" license or licensee is a *successor* license or licensee, and an "original" license or licensee is a *predecessor* license or licensee.

¹⁶ Section 15 of the FWPA was redesignated without change in 1968 as Section 15(a) of the FPA. It states:

That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a *new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a *new license* under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then

fore, that a *new licensee* as used in Section 7(a) plainly is *any licensee except an original or predecessor licensee*.¹⁷ Under their interpretation, the Commission does not get to the threshold of issuing new licenses under Section 15 to *new licensees* unless the original licensee chooses not to file an application for a new license, or unless the Commission first decides not to issue a new license to the original licensee. They say that in issuing new licenses under Section 15 to *any licensee except an original licensee* the Commission is directed by Section 7(a) to give preference to applications of States and municipalities and, conversely, that the municipal preference does not apply against an original licensee.

The public power interests focus their argument on the legislative history of Section 7(a), claiming that the drafters intended to include a broad municipal preference on relicensing, that the preference was included without question in the initial legislative bill, that the subsequent modifications were for clarification rather than change of concept and, consequently, that a broad municipal preference on relicensing remained

licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

It should be noted that the proviso refers incorrectly to the "United States" (rather than the Commission) issuing a license, and refers not consistently to the issuance of a "license to a new licensee" or a "*new* license to the original licensee" (emphasis added). The Third Circuit said, in this connection, in *Metropolitan Edison Company v. Federal Power Commission*, 169 F.2d 719 (Third Cir., 1948), at 723,

To put it bluntly, there are hiatuses and inconsistencies in the Federal Power Act and, as was stated by Judge Learned Hand in *Niagara Falls Power Co. v. Federal Power Commission*, 2 Cir. 137 F.2d 787, 795, * * * it is necessary * * * to break through the band of verbal logic at its weakest spot."

¹⁷ They remind us that licensing under the FWPA and the FPA grew from a leasing concept, and that when a tenant enters into a *new lease* he remains the *original* tenant and does not become a *new* tenant. In other words, his status as a tenant doesn't change, and a *new* tenant would be anyone else. (But see note 44, *infra*.)

in the final bill enacted by Congress and signed by President Wilson. The private power interests, on the other hand, stress the *plain meaning* of "new licensees" derived from Section 15(a) and other provisions, claiming that it is not necessary to resort to the legislative history. They also stress a favorable 1968 interpretation of the General Counsel of the Commission that was transmitted through Chairman White to Congress, claiming that Congress approved that interpretation at that time.

LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT

Jerome G. Kerwin's *Federal Water-Power Legislation* (Columbia University Press, 1926) discusses the economic and legal aspects of water power and is perhaps the most widely recognized authoritative text discussing the legislative history of the FWPA. See, for example, *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965), and *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. A considerably shorter and less detailed history was written by Gifford Pinchot and published in the *George Washington Law Review* in 1945.

The events leading to the FWPA can be separated into two periods. The first period ended in 1917 after the hearings and debates on the early water power bills, and can be characterized as the formative period. The second period, which can be characterized as the legislative period, began in 1917 with the formalization of the final concept of the FWPA, and covers its movement through Congress.

The Formative Period (1890-1917)

According to Kerwin, the first hydro-electric plant was constructed in 1890 and, thereafter, the development of hydro-electric power proceeded at a rapid pace. But it did not proceed fast enough to suit the private power interests. They encountered problems with legislation enacted under the commerce power to keep open the lanes of navigation. And they

encountered opposition from an anti-monopoly conservation movement with respect to their use of the extensive government lands in the western States.

The Rivers and Harbors Act of 1890 prohibited the creation and maintenance of unauthorized obstructions to the navigable capacity of waters within the jurisdiction of the United States. An extension of that Act in 1899 prohibited the construction of dams in navigable waters of the United States without the consent of Congress and the approval of plans by the Chief of Engineers and the Secretary of War.

Prior to 1896, water power sites on government lands were practically given away as homesteads or by sale. According to Kerwin, they passed from government to private ownership as rapidly as the private power interests could "grab" them. In 1896 the Secretary of the Interior was authorized to issue permits to use rights-of-way not exceeding 40 acres for the purpose of generating, manufacturing or distributing electric power. That authority was broadened in 1901 and 1911; but since the permits were revocable at will and were required to be issued under general regulations that did not permit special arrangements, the private power interests were not satisfied.

In 1898 Pinchot became Chief of the Division of Forestry of the Department of the Interior. He states that Federal water power policy began in 1905 when the responsibility for national forests was transferred to the Department of Agriculture, and the new Forest Service, which he headed, chose to develop its own policy. He wrote in 1945, 14 *George Washington Law Review*, at 12,

There was no question which course to adopt. We must make our own policy and *above all keep the title to the power sites in the public hands.* [Emphasis added.]

Pinchot's policy of keeping the title to power sites in the public hands at some level of government is embodied in the recapture and municipal preference provisions of the FWPA and the FPA. His views that private power interestss were "water power grabbers" who were "eager for plunder" are discussed

in *Chemehuevi Tribe of Indians v. Federal Power Commission* (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n. 54.

In 1908 a bill was passed and presented to President Roosevelt to extend the time for constructing a power dam on the Rainy River (a Canadian boundary stream). President Roosevelt vetoed the bill and proclaimed, in a landmark veto message,

Every permit to construct a dam on a navigable stream should specifically recognize the right of the Government to fix a term for its duration and to impose such charge or charges as may be deemed necessary to protect the present and future interests of the United States

* * *

In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:

* * *

Fifth. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at the *time*.

The following year President Roosevelt vetoed the James River bill, repeating the substance of his landmark message. According to Kerwin, the conservationist water power policy promulgated in President Roosevelt's two veto messages resulted from the influence of Chief Forester Gifford Pinchot and one Henry Graves. In 1910 President Taft dismissed Pinchot for insubordination after Pinchot publicly criticized Secretary of the Interior Ballinger.

In the meanwhile, the General Dam Act of 1906 fixed the conditions upon which Congress would consent, by special legislation, to the construction of dams in navigable waters of the United States. The General Dam Act of 1910 replaced its 1906 counterpart and provided for 50-year permits that were revocable for cause and subject to takeover by the United

States on payment of reasonable value. But there was no provision for disposition of the properties at the end of the term, and only 8 of the 29 dams authorized under the two Acts were completed.

In June 1914 the Adamson bill pertaining to water power on navigable streams was introduced in the House and assigned to the Committee on Interstate and Foreign Commerce. After hearings, that bill was reported out of the committee and, following a House debate, was amended into a conservation measure and adopted. In May 1914 the Ferris bill pertaining to water power on government lands was introduced in the House and assigned to the Committee on Public Lands. After hearings, that bill was reported out of the committee, adopted by the House and sent to the Senate. After further hearings, the Senate Committee on Public Lands struck everything but the enacting clause and substituted the Myers bill favorable to private power interests. With respect to water power on navigable streams, the Senate stood behind the Shields bill, which was introduced in December 1915 and was also favorable to private power interests. The principal divisive issues pertained to charges for power privileges and recapture. President Wilson tried and failed to cause water power legislation to be enacted prior to the entry of the United States into World War I.

The most important thing to understand about the formative period is that it ended with a general understanding that if the nation's water power resources were to be preserved for the public, it would be necessary to place a time limit on a private lessee's or licensee's use of the resources, and enact nothing which would, in effect, give a right of perpetual use to a private lessee or licensee.

The Legislative Period (1917-1920)

The hearings and debates on the early water power bills provided forums in which the competing interests sharpened and resolved issues. One seemingly insoluble problem, however, was the superabundance of committees with jurisdiction

over some face of water power legislation—Public Lands, Indian Affairs, Agriculture, Military Affairs, Interstate and Foreign Commerce, Foreign Affairs and Rivers and Harbors.

In 1917 the Secretaries of Agriculture, the Interior and War caused an interdepartmental committee to be formed to draft a water power bill treating both navigable waters and government lands; and Oscar Charles Merrill, Chief Engineer of the Forest Service since 1905, was designated as the committee member from the Department of Agriculture.¹⁸ That committee drafted a bill that was presented to President Wilson and approved by him and the three Secretaries just before the Christmas holidays in 1917. Just after those holidays the President presented the so-called Three Secretaries Bill, or Administration Bill, to certain House committee chairmen and requested the formation of a special Committee on Water Power to get that bill through Congress. The committee was authorized and, on January 15, 1918, the bill was introduced by Congressman Raker in the 65th Congress, 2d Session, as H.R. 8716.

The hearings of the Committee on Water Power lasted from March 18 to May 15, 1918, during which period Congress was preoccupied with World War I. H.R. 8716, which was treated as a substitute for the Shields bill, S. 1419, was reported out of the committee with changes, debated and changed further in the House, and passed by the House. The bill reached the Senate on September 19, 1918, and was referred to conference on September 30, 1918. The report of the conference was

¹⁸ In *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953), at 305, n. 10, the Supreme Court accepted Merrill's testimony before the House Committee on Water Power as presenting the views of the Secretaries of Agriculture, the Interior and War. Merrill remained in government after Pinchot's 1910 discharge and thus was in an influential position to continue Pinchot's policies. His role in developing the FWPA is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well as to the President and his Cabinet.

introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died.

A similarly composed special Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and the bill was reported out of the committee. The House and Senate both passed H.R. 3184 with changes, and on January 17, 1920, sent it to conference. Finally, the report of the conference was approved by the House and Senate, and H.R. 3184 was sent to the President on May 31, 1920, shortly before Congress adjourned, and signed by him in time to avoid a pocket veto.

LEGISLATIVE HISTORY OF SECTION 7

Merrill prepared a memorandum dated October 31, 1917, of the principles that were to be embodied in the Administration Bill, stating in pertinent part,

At the termination of license United States to have right to take over the plants [sic] or plants covered by the license, or to transfer them to a State or municipal corporation applying therefore, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations.

Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy. In any event,

freedom of action in this respect should not be fore-closed by legislation at the present time.

The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

Thereafter, Merrill drafted a bill which stated in a proviso to Section 15, consistent with the memorandum,

That in issuing such new license, the original licensee shall have a preference right over any other applicant therefor, *except a State or a municipality.* [Emphasis added.]

The hearings and debates on the early water power bills produced proponents of a relicensing preference for initial licensees. Merrill's draft contained what was apparently the penultimate appearance of such a preference prior to the enactment of the FWPA and shows clearly that original licensees were *not* to be preferred over States and municipalities. The proviso was removed from the Administration Bill prior to its introduction in Congress, thus eliminating the original licensee's preference over other private applicants, but not the municipal preference against private original licensees (which was in the first paragraph of Section 7).

The committee of the Departments of Agriculture, the Interior and War (of which Merrill was a member) finalized Merrill's draft and presented the finalized version to the three Secretaries who, on December 14, 1917, transmitted it to President Wilson. Later that month the President presented it to certain House committee chairmen and used his influence to cause them to form a special Committee on Water Power. The Administration Bill was introduced on January 15, 1918, as H.R. 8716, and provided in the first paragraph of Section 7:

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation

and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.¹⁹

We observe that in the light of Merrill's memorandum dated October 31, 1917, and the absence of any words restricting the municipal preference to initial licensings, it is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all relicensings, as well as all initial licensings. Some of the private power interests argue, however, that the municipal preference expressed therein applied only to initial licensings because it was conditioned on a Commission finding of "plans" being adapted to the purposes indicated, which refers to the licensing of new projects. But since Section 4 then as now authorized the issuance of licenses for the construction, operation and maintenance of project works, the finding clearly applied to plans for operation and maintenance as well as plans for construction. Similarly, the reference to "developing power" does not limit the municipal preference to initial licensings because those words can mean "generating power" as well as "constructing facilities for generating power".

During the course of the hearings of the Committee on Water Power certain representatives of private power interests indicated that they were reconciled to the proposition of a municipal preference against original licensees. For example, E. K. Hall, Vice President of the Electric Bond & Share Company, and a leading spokesman for private power, testified,²⁰

MR. CANDLER. Now then do you understand that under this bill the Government of course has the first right to retake the property?

¹⁹ House Report No. 715, 65th Congress, 2d Session, dated June 28, 1918.

²⁰ Ellen Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act*, 1966, at 459c.

MR. HALL. Yes, sir.

MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the [sic., other?] licensees might be preferred over the first licensee?

MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

MR. CANDLER. Then the original licensee would have only the third opportunity to count on his lease.

MR. HALL. That is the way I understand it

On the other hand, at one point in those hearings Congressman Sims, Chairman of the Committee on Water Power, expressed his view that the Administration Bill did not contain a municipal preference that was applicable to relicensings. (Dove, at 509).²¹

²¹ Dove, at 509:

The CHAIRMAN. Mr. Secretary, it has been very seriously urged before the committee as a part of the recapture provision that we provide that if the United States Government did not want to avail itself of the recapture provision that a State or municipality which wanted the water power for State or municipal purposes should have the second opportunity and the preference over a private licensee.

Secretary LANE. I think that was in one of the bills, was it not?

The CHAIRMAN. It is not in this one.

Secretary LANE. It seems to me that is a very reasonable proposition.

Mr. FERRIS. I think that is a proposition which has been advanced by Mr. Taylor of Colorado.

Mr. TAYLOR. Yes. I have always very emphatically insisted that they should have a preference right over corporations or over private individuals to take over not only water power, but coal mines and other things for the purpose of preventing extortion in towns and cities, and I hope that when we get through with this legislation that provision will be in here and that it will meet with your approval. I am earnestly hoping that if the Government itself does not see fit and desire to take over these

During the course of those hearings Merrill suggested an amendment to the municipal preference of Section 7 (Dove, at 444) to carry out the purpose of Section 5 of "maintaining priority of application for a license" for citizen and corporate holders of preliminary permits who had expended funds investigating water power sites. On June 28, 1918, the Committee on Water Power committed the bill to the Committee of the Whole House,²² at which time the first paragraph of Section 7 provided,

That in issuing *preliminary permits* or licenses hereunder, the commission may in its discretion give preference to applications ~~for licenses therefor~~ by States and municipalities ~~for developing power for State and municipal purposes~~, provided the plans for the same are deemed by the commission to be *best* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.²³

We observe that the amendment appears to have extended the municipal preference of Section 7 to the issuance of preliminary permits, but does not appear to have eliminated that preference with respect to the issuance of licenses pursuant to outstanding preliminary permits, as Merrill had suggested. Additionally, the amendment appears to have eliminated any limitations on that preference that might have been implicit in the phrase "for developing power for State and municipal

matters at the expiration of the 50 years, the preference right shall be given first to the municipalities or states and second to the occupant or the licensee.

In context, because of the absence of an express reference in Section 7 to relicensings, Chairman Sims may have failed to realize that the language of the provision was broad enough to include relicensings.

²² House Report No. 715, 65th Congress, 2d Session. The Administration Bill was treated as an amendment of the Shields bill, S. 1419.

²³ Additions are *[italicized]*; deletions are expunged.

purposes", and to have applied the *best adapted* standard of the second preference to the municipal preference. *But there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

On the floor of the House, Congressman Doremus proposed an amendment to Section 7 (Dove, at 623) to make the municipal preference mandatory instead of discretionary, except insofar as the Commission would have to determine in its discretion whether the plans of a State or municipality were adapted to conserve and utilize in the public interest the navigation and water resources of the region. His proposal was adopted and, as approved by the House on September 5, 1918, Section 7 provided,²⁴

That in issuing preliminary permits or licenses hereunder the commission ~~may in its discretion~~ *shall* give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission ~~to be best~~ adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may ~~likewise~~ give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

We observe that in addition to making the municipal preference mandatory, although subject to a finding in the discretion of the Commission, the words "to be best" were deleted so that States and municipalities would not be required to submit

²⁴ S. 1419, 65th Congress, 2d Session, as printed September 6, 1918.

The debate on the floor of the House (Dove, at 623-5) shows clearly that the Commission would have discretion in administering the municipal preference. Congressman Doremus said,

You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

plans that were better than those of citizens and corporations. The word "likewise" was deleted as being "not necessary" in view of the change to the municipal preference. *There still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

The House-approved bill was referred by the Senate on September 19, 1918, to a conference, where it stalled. On February 26, 1919, the conference reported a bill²⁵ in which Section 7 was changed to read,

That in issuing preliminary permits *hereunder* or licenses ~~hereunder~~ *where no preliminary permit has been issued* the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission *equally well* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The explanation of the foregoing changes in House Report No. 1147 is, "Your committee thought these changes were in the interest of clarity."

It appears that the committee of conference obscured more than it clarified. It is apparent that the committee settled on the "equally well adapted" standard in the light of the disagreement of the House and the Committee on Water Power on an appropriate standard. And it is equally apparent that "hereunder" was transposed and "where no preliminary permit has been issued" was added to eliminate the municipal preference with respect to licenses that were issued pursuant to outstanding preliminary permits, as Merrill had suggested to the Committee on Water Power.

²⁵ House Report No. 1147, 65th Congress, 3d Session.

But the reference to "licenses where no preliminary permit has been issued" in conjunction with "preliminary permits" made it *appear* that the municipal preference applied only to the issuance of preliminary permits and some initial licenses; i.e., those where no preliminary permit had been issued. *In point of fact, there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.* In point of fact, the issuance of a successor or new license is the issuance of one "where no preliminary permit has been issued".²⁸ Therefore, Section 7 continued to provide a preference in favor of States and municipalities in all relicensings.

As will be seen, the language that emerged from the conference committee "in the interest of clarity" is the touchstone of the present controversy. The public power interests go back to Section 7 of the Administration Bill as introduced and argue that the municipal preference contained therein for all relicensings was never changed. The private power interests look to Section 7 as it emerged from the conference committee and argue that it contains no municipal preference for relicensings.

The report of the conference was adopted by the House but was still pending in the Senate when Congress adjourned on March 4, 1919. When the 66th Congress convened, a bill identical to that in the report of the conference was introduced as H.R. 3184 and, on June 24, 1919, was reported without

²⁸ The language creates a latent ambiguity in a situation in which a successor license would follow an initial license which, in turn, would follow a preliminary permit. It would seem, however, that the reference to no preliminary permit having been issued means a permit immediately preceding the license under consideration, that is still outstanding. If the committee had said, instead,

That in issuing preliminary permits or licenses, other than licenses pursuant to outstanding preliminary permits, . . .

then, perhaps, the controversial Pinchot/Lenroot/Jones amendment, *infra*, would not have been necessary.

change to the Committee of the Whole House. On the floor of the House, Congressman Sinnott proposed an amendment that would permit States and municipalities to amend their plans to make them "equally well adapted" to those of competing private applicants so that such public applicants would not be foreclosed from obtaining licenses because their plans were not as well adapted. The amendment was approved on July 1, 1919, and Section 7 then read,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, *or shall be made equally well adapted*, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The House-approved bill was referred to the Senate and was reported out of the Committee on Commerce with amendments on September 12, 1919. Senate Report No. 180, 66th Congress, 1st Session, states in this connection,

Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development with ultimate public ownership possible.* [Emphasis added.]

Section 7, as reported to the Senate, provided,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor

by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall *within a reasonable time to be fixed by the commission* be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region *if it is satisfied as to the ability of the applicant to carry out such plans.*

Although the report of the Committee on Commerce does not explain how the phrase "and in issuing licenses to new licensees under section 15 hereof" came to be added to Section 7, it was added as a result of the following events: Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, had introduced a water power bill (S. 152) in which Section 7 was identical to Section 7 of the bill reported out of conference in the previous session. Senator Lenroot, a conservationist, had introduced another bill (S. 1192) that was a pro-conservationist revision of the bill reported out of conference in the previous session. On June 25, 1919, Pinchot, who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Jones' S. 152 including, with respect to Section 7,

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose *surely*, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import. [Emphasis added].

Pinchot took the suggested language from Lenroot's S. 1192, and that language, as suggested, was added to H.R. 3184.

We observe that there still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced. The intent as expressed by Pinchot was just the opposite—to clarify Section 7 so that the municipal preference

therein would "surely" apply to relicensings. If States and municipalities had such a preference against private initial licensee-applicants immediately prior to the amendment, and if "new licensees" refers to any licensees under a new license (as the public power interests contend), then the Pinchot/Lenroot/Jones amendment was of a clarifying nature, as Senate Report No. 180 characterized most of the amendments therein. But if States and municipalities had such a relicensing preference immediately prior to the amendment, and if "new licensees" refers to any licensees except an original licensee (as the private power interests contend), then the Pinchot/Lenroot/Jones amendment would have restricted the scope of the municipal preference contrary to Pinchot's conservationist philosophy. Some of the private power interests recognize that inconsistency and, therefore, argue from the language of Section 7 that States and municipalities did not have such a relicensing preference immediately prior to the Pinchot/Lenroot/Jones amendment and, therefore, that amendment gave them a limited relicensing preference²⁷ consistent with Pin-

²⁷ Limited to situations in which private initial licensees do not become applicants for new licenses—which the public power interests contend are situations in which projects are not worth relicensing. And limited to situations in which the Commission first determines not to issue new licenses to private initial licensee-applicants—which the public power interests contend require a non-existent two-step relicensing procedure. If there were such a procedure, they say, the Commission would first determine whether or not to issue a new license to the initial licensee; and, if it does so, the Commission would give a *de facto* preference to initial licensees, contrary to the legislative history opposing perpetual licenses. It should be noted, in this connection, that one of the principle [sic] purposes of the 1968 amendments to the FPA was to eliminate a three-step procedure by which Congress would approve Commission recommendations not to take over projects before the Commission would fix the terms of and issue new licenses. It should also be noted that it is the practice of the Commission to decide questions pertaining to the identity of licensees and the terms of contested licenses at the same time.

chot's conservationist philosophy. They contend that Pinchot proposed the amendment because there was either no municipal relicensing preference or an uncertain municipal relicensing preference in Section 7 in view of its silence with respect to relicensings. But that would have been a substantive rather than a clarifying change, as Senate Report No. 180 indicates. And although they also contend that the question of whether Section 7 contained a municipal relicensing preference became moot when Congress addressed relicensing in the Pinchot/Lenroot/Jones amendment, the existence or nonexistence of such a preference appears to continue to be material to the Commission's interpretation of the language of that amendment.²⁸

The bill reported out of the Committee on Commerce was approved by the Senate on January 15, 1920, without change to Section 7, and the House and Senate versions were sent to conference. The Conference Report issued April 30, 1920 (House Report No. 910, 66th Congress, 2d Session) recommended that the House recede from its opposition to the Senate amendments, which were described therein as being "verbal changes" that were "desirable, as they clarify the text", with the exception that the last phrase added by the Senate would be revised to read, "if it be satisfied as to the ability of the applicant to carry out such plans."

²⁸ The Initial Decision pertaining to the Walters Hydro-electric Development (*Carolina Power & Light Company*, Project No. 432), was based on the "plain meaning" of "new licensees" in Section 7(a) and suggests that the presiding judge did not understand the legislative history of the Pinchot/Lenroot/Jones amendment. The Initial Decision states, mimeo, at 10,

While it is true that Mr. Merrill intended the preference to also apply in renewal proceedings against the original licensee, the fact remains that Congress changed the original text by adding the word "new" before licensee in Section 7(a). The Senate Committee on Commerce Report that added the word "new" offered no comments whatsoever on this amendment.

Merrill, under date of January 27, 1920, prepared a memorandum on the Senate amendments to H.R. 3184 which stated that the amendments to Section 7 "strengthen" it; and under date of April 27, 1920, prepared a memorandum for Congressman Lee, a member of the committee of conference, stating,

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and *in case of acquiring properties of another licensee at the end of a license period*. [Emphasis added.]

On May 4, 1920, Congressman Lee used Merrill's exact words to assure his colleagues with respect to the municipal preference (Dove, at 814), and the Conference Report was approved by the House on the same day.

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

For development by agencies other than the United States preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of a license period*. [Emphasis added.]

As indicated, President Wilson signed H.R. 3184 on June 10, 1920.

THE PLAIN MEANING OF "NEW LICENSEES"

Section 7(a) of the FPA provides, in pertinent part,

. . . [I]n issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities

While the public power interests contend that "new licensees" plainly are any licensees under new licenses, the public power [sic] interests argue that "new licensees under section 15" are

distinguished from "original" licensees, just as is done in Section 15(a). They say that a phrase used in different parts of a statute is to be given the same meaning throughout, unless the context clearly indicates otherwise,²⁹ and that a statute should be construed to give effect to all of its words.³⁰ And they conclude,

When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), n.29, at 184.

THE 1968 AMENDMENTS TO THE FEDERAL POWER ACT

The FPA contains no provisions for renewing or extending licenses. As enacted in 1920 and reenacted in 1935, Section 14

²⁹ Their reliance on Section 22 is proper because that provision, which pertains to a "new licensee" assuming Commission-approved contracts, distinguishes between an "original licensee" and a "new licensee" in the same context as Section 15(a). But their reliance on Section 7(c) is improper, first, because that provision was not enacted in 1920, but in 1968, and second, because that provision would not be changed by omitting the [*italicized*] words:

Whenever . . . the Commission determines that the United States should . . . take over any project . . . the Commission shall not issue a new license *to the original licensee or to a new licensee* but shall submit its recommendation to Congress . . . [Emphasis added].

Similarly, their reliance on Section 15(b) is improper because that provision also was enacted in 1968 and uses "new licensee" in the same context as Section 15(a).

³⁰ They argue that the public power interests construe "to new licensees" as having no significance, so that the phrase would read, "in issuing licenses under section 15 hereof." The public power interests reply that "to new licensees under section 15" refers to long-term licenses under that provision, as distinguished from annual licenses thereunder which can be issued to the "then licensee". They say that annual licenses possibly could have been confused with long-term licenses if "to new licensees" had been omitted from Section 7(a).

gives the United States "upon not less than two years' notice in writing from the commission . . . the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects . . ." upon the payment of the net investment plus severance damages. If the United States does not do so, Section 15 authorizes the Commission to issue a new or successor license. And if the Commission does not do so "upon reasonable terms", Section 15 directs the Commission to issue annual licenses to the "then licensee" under the terms and conditions of the original or predecessor license "until the property is taken over or a new license is issued. . . ."

As a result of these provisions, a three-step takeover/relicensing procedure developed in the 1960's, as the 50th anniversary of the FWPA and the reality of expiring licenses approached. First, the Commission submitted information on expiring licenses to Congress together with its recommendations regarding takeover. Second, Congress considered and acted on the recommendations. And third, since no projects were taken over, the Commission considered and acted on the applications for new, or successor, licenses.

In 1967 the Commission proposed certain amendments to the FPA that would eliminate that three-step procedure and permit it to consider takeover recommendations and relicensing applications at the same time. The proposal was unopposed and, as enacted in 1968, added Sections 7(c), 14(b) and 15(b) to the FPA.³¹ Under the new procedure, any Federal department or agency may recommend during the course of any relicensing

³¹ The Act (Public Law 90-451) recited that its purpose was "to clarify the manner in which the licensing authority of the Commission and the right of the United States to take over a project or projects upon or after the expiration of any license shall be exercised." One substantive provision, that would have permitted the Commission to amend licenses to impose "further reasonable requirements", was omitted from the final bill.

proceeding that the United States take over the project or projects in question, and if the Commission agrees, it is required to submit its recommendation to Congress and may not issue a new license. But if the Commission does not agree, it is required, upon request by a Federal agency recommending takeover, to stay the effective date of its order issuing a new license to give Congress two years to consider takeover. Thus, Congress would consider only projects recommended for takeover, rather than all projects.

During the course of the hearings on the 1968 amendments the Commission's General Counsel testified with respect to the House and Senate bills (Hearings on H.R. 12698 and H.R. 12699, at 32),

They are procedural bills designed solely to permit the recapture and relicensing determinations to be made efficiently and in harmony with the purpose underlying the limited term license. There has been no attempt to modify the substantive standards which the Commission is required to apply in determining whether or not to recommend recapture and in passing upon relicensing proposals.

and, at 34,

Another issue which has received considerable attention in the Senate hearings relates to the substantive question of the relative rights of the existing licensee and other would-be applicants in a relicensing proceeding before the Commission in the event Congress does not act to recapture a project. The Commission bill does not attempt to deal with this question.

The report of the House Committee on Interstate and Foreign Commerce on the amendment bill (House Report No. 1643, 90th Congress, 2d Session) did not address the municipal preference of Section 7(a). The report of the Senate Committee on Commerce on the amendment bill (Senate Report No. 1338, 90th Congress, 2d Session), on the other hand, did address that preference, as follows:

During the course of the hearings on S. 2445, your committee heard considerable testimony on the question

of whether the preference which is extended under subsection 7(a) of the Federal Power Act to States and municipalities in their application for a license for a new hydroelectric power project also extends to those cases where an existing private power hydroelectric project license has expired, and in addition to the original licensee's application for a new license, a State or municipality also files an application for the new license.

Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this area and the policy it now applies to implement the law.³² In his letter of August 28, 1967, to the Vice President, submitting the proposal which became S. 2445, Chairman Lee White stated:

Under section 7(a) of the Federal Power Act the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has determined that the original licensee should not receive a new license. In those instances where the original licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant.

And further on in the same letter he said:

[Finally we have considered establishing an additional preference for the original licensee to apply in cases where a rival applicant could slightly better achieve the objective of the Act.]³³ We believe that all other things being equal,

³² Contrary to the committee's expressed belief that the Commission's General Counsel's interpretation was then being applied as a work practice, the Commission is only now addressing the applicability of the municipal preference to relicensings for the first time in a proceeding under the FPA.

³³ The bracketed sentence was in Chairman White's letter and is added back to restore the context.

continuity in ownership and management is a value in itself which should be recognized and is to be recognized under the present statute. However, when another applicant demonstrates a superior ability to meet the congressional objectives, in our view no preference should assure the position of the original licensee.

If the original licensee files an application for a new license, unless the Commission finds that the project, with such modifications and conditions as it may prescribe, would not be best adapted to a comprehensive plan for improving or developing the waterway involved, the Commission then would issue to the original licensee a new license containing such modifications and conditions as it may find appropriate or necessary.

Continuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results. Granting of the license to a different licensee can only be justified when the existing licensee is unable or unwilling to carry out whatever modifications are found to be necessary for comprehensive development of the waterway or to meet the standards of the act.

Section 14 of the existing act expressly reserves the rights of the States and municipalities to take over any project by condemnation proceedings upon payment of just compensation. States and municipalities, therefore, have a priority which can be exercised by eminent domain before, during, or after relicensing. On the other hand, if the State or municipality does not exercise this priority, and the existing licensee is willing and able to develop, redevelop, and operate the project so that it would be best adapted to a comprehensive plan for improving or developing the waterway involved, the new license should be issued to the existing licensee.

Chairman Magnuson and Senators Hart, Brewster and Moss expressed their supplemental (minority) views, as follows:

S. 2445, introduced at the request of the Federal Power Commission, was designed merely to clarify the procedure to be followed upon the expiration of existing hydro-

electric power project licenses. No substantial changes in the Commission's licensing authority were intended in this amendment to the Federal Power Act.

For this reason, no provision was made in the bill for priorities or preferential rights on relicensing, and it is our opinion that the committee report should remain silent on this issue.

Under section 7(a) of the act, the Commission is instructed to give preference to applications by States and municipalities in issuing original licenses and "in issuing licenses to new licensees under section 15," the relicensing provision. It is not clear what this language means and *it has never received either formal administrative or judicial interpretation*. The publicly owned utilities interpret the provision to require application of their preference on relicensing, arguing that when an original license expires, a new license must necessarily be issued to a "new licensee." The privately owned companies disagree, arguing that if the original licensee is seeking relicense, he is not a "new licensee" and the preference should not apply. In fact, the privately owned companies content [sic., contend] that a preference should lie with the existing licensee. In addition, the rural cooperatives have requested a statutory amendment providing them with the same preference as public agencies, to apply on relicensing as well as original licensing [Emphasis added].

Succinctly stated, the issues are (a) whether the statutory preference for public development of our water resources applies on relicensing; (b) whether the public agency preference should be extended to rural cooperatives; and (c) whether the existing licensee should have a preference or priority on relicensing.

No attempt should be made to resolve these difficult questions without careful research and study and a clear understanding of the implications of any decision reached. The suggestions of the various parties go beyond the scope of the bill as presented to the Congress and this committee.

Furthermore, continuity of ownership and management, tax revenues, and employment opportunities, factors mentioned in the majority report, are not the criteria

which the act directs the Commission to consider in the issuance of licenses. Similarly, nothing in the act indicates that it is in accord with the majority's view that granting of a license to a new licensee "can only be justified when the existing licensee is unable or unwilling" to carry out modification of the project. The standard to be utilized in the issuance of both licenses and relicenses is found in section 10(a) of the Federal Power Act.

S. 2445 is primarily a procedural, housekeeping bill providing congressional direction for the relicensing process. The legal, constitutional, and policy questions raised in the majority report seriously change the tenor and import of this bill. Only [sic., Only] administrative changes should be considered in this bill, and substantive changes in the Power Act, is [sic., if] needed or desired, should be considered at a separate time.

For these reasons, we cannot subscribe to that portion of the report which relates to section 7(a) of the Federal Power Act.

The private power interests contend that the 1968 amendment of Section 7 was a reenactment of that provision and that Congress, by amending the FPA in 1968 with knowledge of the Commission's interpretation of the municipal preference, thereby approved the Commission's interpretation. They contend, additionally, that that interpretation cannot be changed now by Commission action. And they cite, among other decisions, *Kay v. Federal Communications Commission*, 443 F.2d 638 (D.C. Cir., 1970), at 646,

[A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has Congressional approval.

PG&E, in its initial brief at 22, claims that the facts involved in the enactment of the 1968 amendments are essentially indistinguishable from the facts considered by the court in *Association of American Railroads v. Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1970), which is one of the leading cases on the subject. Santa Clara responds do that claim at 70 of its reply brief, saying that PG&E's claim is not

supported by the decision. This "doctrine of reenactment" is discussed *infra*.

The public power interests and the staff counsel take the position that the 1968 enactment of Section 7(c), pertaining to the procedures interrelating relicensing and takeover, was not a reenactment of Section 7(a), pertaining to the standards for selecting applicants, and consequently the "doctrine of reenactment" does not apply. They contend that there is no long-standing Commission application and consequent interpretation of the municipal preference in rulemaking or contested adjudicatory proceedings, as is required under the doctrine, and as proved by the fact that the Commission initiated this declaratory order proceeding for the purpose of developing a working interpretation of that preference. And they contend that while one committee report seemed to approve the Commission's General Counsel's interpretation, there is no proof that Congress as a body approved that interpretation.

LICENSE TRANSFEREES AS "ORIGINAL LICENSEES"

While all of the parties do not address the second issue for declaratory order specified in the order of May 3, 1979, all who address it except the staff counsel and Santa Clara appear to agree with one another that an assignee or successor licensee is an "original licensee" within the meaning of Section 15(a).³⁴ They cite Section 8 of the FWPA, which is now Section 8 of the FPA, as follows:

That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all of the conditions of the license under which such rights are held by such licensee and also subject to all

³⁴ The Commission staff counsel says that the issue is moot if it is found that the municipal preference is applicable to relicensings against original licensees that are not States or municipalities.

the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

The Hydro Group contends, in this connection, that the clear purpose of Section 8 is to place transferees in the shoes of original licensees. They argue: (1) that the Commission can issue new licenses under Section 15 only to "new licensees" and "original licensees", (2) that "new licensees" and "original licensees" are mutually exclusive, (3) that transferees are in possession of project works while "new licensees" are not, and (4) that if transferees are not "original licensees" the Commission has no authority to issue new licenses to them, which would produce an absurd result. And PG&E argues that the statutory language that

. . . any successor or assign . . . shall be . . . subject to *all* the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee [Emphasis added] . . .

leaves no doubt that the treatment prescribed for "assigns" carries through "all the provisions" of the FPA, including Section 15.

Santa Clara contends, on the other hand, that PG&E is not the "original licensee" (in the sense of the first licensee) of the Mokelumne River Project because it is a transferee from the "original licensee",³⁵ stating,

[S]ince the Section 15(a) term "then licensee" encompasses both an "original licensee" and a "present licensee",

³⁵ PG&E was the first licensee of several projects that were consolidated under the docket number, or project number, of the Mokelumne River Project, as to which PG&E was a transferee licensee. As a result of the consolidation, PG&E became both a transferee licensee and the first licensee of portions of that project as then licensed.

and PGandE is clearly the "present licensee", PGandE cannot even claim the benefit of any possible 15(a)-7(a) exclusion of "original licensees" from the municipal preference. As something different from the "original licensee", PGandE would, without question, fall literally within the 7(a) municipal preference in renewal contests: ". . . in issuing licenses to new licensees."

APPLICABILITY OF SECTION 7(a) TO RELICENSINGS

Plain Meaning

We turn first to the question of the plain meaning of "new licensees" because we are admonished by some of the parties not to look at the legislative history if that term has a plain meaning in Section 7(a).

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Supreme Court reversed the Tenth Circuit (507 F.2d 743 (1974)) for its failure to consider the legislative history of the term "pollutant" as used in the Federal Water Pollution Control Act (FWPCA), stating, at 9,

To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [Citations omitted.]

Two years later, however, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court said, at 184, n. 5,

When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. [Citation omitted.] Here it is not necessary to look beyond the words of the statute. *We have undertaken such an analysis* only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case . . . is not in accord with congressional intent. [Emphasis added.]

Coming closer to "home", the District of Columbia Circuit held in *Chemehuevi Tribe of Indians v. Federal Power Com-*

mission, 489 F.2d 1207 (1973), that steam plants are not licensable as such under the FPA, stating, at 124 (footnotes omitted),

It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. . . . Under the "ordinary man" or "plain meaning" canon of statutory construction, petitioners argue, the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.

In answering a similar argument, the Second Circuit has said:

We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.

Our role is to give effect to the intention^{} of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose. The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only where the words of the statute are ambiguous but also "when the literal words would bring about an end completely at variance with the purpose of the statute." [Emphasis added.]*

Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a different meaning by following the reference in Section 7(a) to Section 15 of the FWPA, which is Section 15(a) of the FPA, suggest that there is a sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

But if that suggestion is not enough, we observe that the public power interests and the Commission staff counsel have failed to challenge a hypothesis that is implicit in the position of the private power interests—that the term “new licensee”, which is used three times in Section 15(a), has a meaning that can be carried forward into Section 7(a). And we conclude that it has no such meaning because the contexts of usage are different.

Just as the private power interests follow the reference in Section 7(a) to Section 15(a), our analysis follows the reference in Section 15(a) to Section 14 of the FWPA, which is Section 14(a) of FPA. That provision is concerned with the subject of takeover upon or after the expiration of any license, and uses the term “licensee” eight times to refer to the citizen, corporation, State or municipality that is in possession of a project under an expiring or expired long-term license.³⁶ Section 14(a) also uses the term “United States” three times to refer to the government that must pay the net investment plus severance damages to the “licensee”, and must assume certain contracts, before taking possession.

Section 15(a), on the other hand, is concerned with the subject of successor licenses if the “United States” does not, at the expiration of the “original license”,³⁷ take over the project works of the “licensee”—using the term “licensee” in the same context as in Section 14(a) to mean the citizen, etc., in possession under an expiring or expired long-term license.

³⁶ If a “licensee” is in possession under an expired long-term license, it would also be in possession under a current annual license since the FPA is designed to avoid gaps between long-term licenses.

³⁷ If the term “original license” as used in its first appearance in Section 15(a) does not refer to the expiring or last expired long-term license, which might or might not be the first license, then the Commission would have authority under Section 15(a) to relicense project works only once. A literal reading of “original license” to mean the first license in all cases would produce an absurd result that

Thereafter, Section 15(a) uses the term "original licensee" (instead of "licensee" as in Section 14(a)) two times to refer to the citizen, etc., that is in possession under an expiring or expired long-term license, and not necessarily the first licensee. And it uses the term "new licensee"³⁸ three times to refer to the citizen, corporation, State or municipality (in lieu of the "United States" in Section 14(a)) that must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, before taking possession.

*In other words, "original licensee" and "new licensee" are used in Section 15(a) as correlative terms to describe a predecessor/successor relationship in a context of successive license terms.*³⁹ Section 15(a) authorizes the Commission to issue successor licenses to any citizen, etc., eligible for an initial license.⁴⁰ And it is necessary to distinguish between the

would bring about an end completely at variance with the purpose of the FPA.

Furthermore, it is appropriate to construe the words "original" and "new" consistently within Section 15(a) to have their same respective meanings preceding both "license" and "licensee".

³⁸ "New licensee" is an unfortunate choice of terms because an applicant for a successor license (that is not an "original licensee" in possession) does not become a licensee until the license is accepted *after issuance*.

³⁹ This interpretation disposes of the second issue raised in the Commission's order of May 3, 1979. An "original" licensee in the context of Section 15(a) is a predecessor licensee in possession, which status has no relationship to the question of whether that licensee is also the "original" or first (or initial) licensee in the context of Section 8, or an assignee or successor of the first (or initial) licensee.

⁴⁰ The municipal preference issue in this proceeding pertaining to the meaning of "new licensees" in Section 7(a) is not the only major issue spawned by the Pinchot/Lenroot/Jones amendment. It has been argued that in view of the words in Section 7(a) "in issuing licenses . . . under section 15 hereof", the Commission's authority in issuing successor licenses is limited to Section 15(a), excluding Sec-

"original licensee" in possession and a "new licensee" not yet in possession because a successor licensee must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, *only* if that successor is not also the predecessor licensee.⁴¹

Finally, Section 15(a) provides that if the United States does not take over the project works and the Commission does not issue a successor long-term license, then the Commission shall

tion 4(e) pertaining to the issuance of licenses generally. Accordingly, it has also been argued that the Commission doesn't have to find under Section 4(e) that a successor license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired, and that a successor license is not subject to and need not contain the conditions that a departmental Secretary deems necessary for the adequate protection and utilization of the reservation. The issue was addressed in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, wherein the Commission indicated (mimeo, at 98) that Section 15(a) does not specify (1) *to whom* successor licenses may be issued (to citizens of the United States, associations of such citizens, certain corporations, States and municipalities), (2) *for what purposes* they may be issued (for constructing, operating and maintaining project works, or utilizing surplus water or water power) and (3) *on what jurisdictional bases* they may be issued (bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams), all of which are supplied by Section 4(e). The issue was not reached in Opinion No. 36 because the successor licensing therein was treated partly as an initial licensing and partly as a relicensing.

⁴¹ Section 22, which is concerned with certain contracts for the sale and delivery of power, uses the term "licensee" once in the same context as in Section 14(a) to mean the citizen, etc., in possession, in a context in which it is not necessary to distinguish between the citizen, etc., not yet in possession. It also uses the correlative terms "original licensee" and "new licensee" once each in the same context as in Section 15(a) when it is necessary to make such a distinction, for a successor licensee must assume certain contracts only if that successor is not also the predecessor licensee.

issue annual licenses to the "then licensee"—which is almost but not quite the same as the "licensee" in possession in Section 14(a) and at the beginning of Section 15(a), and the "original licensee" in possession thereafter in Section 15(a). Since the recipient of an annual license must always be in possession, a "then licensee" differs from a "new licensee" conceptually in that there is no need to distinguish between a successor in possession from one not yet in possession. And since annual licenses may succeed predecessor annual licenses as well as long-term licenses, a "then licensee" differs from a "licensee" conceptually in that it includes a citizen, etc., in possession under an expiring or expired *annual* license.⁴²

There are two places in the FPA at which the terms "original licensee" and "new licensee" are used separately and not correlatively. The term "original licensee" is used in Section 8, *supra*,⁴³ to mean the first or initial licensee in the context of a single license term. Although the words "or otherwise" in Section 8 are inclusive enough to cover a successor licensee in the context of successive license terms, the words "any successor or assign . . . shall be subject to all the conditions of *the license under which such rights are held*" (emphasis added) appear to limit the overall context to a single license term. In other words, a Section 8 "original licensee" is a first or initial licensee within a license term, whereas a Sections 15(a)/22 "original licensee" is a predecessor licensee as between two license terms. The term "original licensee", when used alone in

⁴² Consistent with the interpretation of the word "original" herein, in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, the Commission (mimeo, at 191) interpreted the term "original license" in the proviso of Section 15(a) as distinguishing the expiring license from a "new license", "and not as referring to the terms imposed by the expiring license when it was originally issued."

⁴³ Section 8 uses the term "such licensee" in two places without an antecedent reference to "such". Nonetheless, "such licensee", like "original licensee", appears in context to refer to the first licensee.

Section 8, does not have the same meaning as the same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees"; when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

Sections 15(a) and 22 are concerned with predecessor/successor relationships in a context of successive license terms. Section 7(a), as the Hydro Group concedes, is concerned with the standards to be applied by the Commission in choosing among applicants.⁴ It is concerned with choosing applicants as licensees for the forthcoming license term, whether that is the initial term or a successor term. But like Section 8, and unlike Sections 15(a) and 22, it is concerned with the single license term under consideration. Accordingly, we conclude on the basis of the intrinsic evidence within the statute that Section 7(a) "new licensees" are those who may be chosen (i.e., the applicants) for the new or forthcoming license term, which

⁴ In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean, simply, "in considering applications of new licensees", or, as Santa Clara argues (*supra*, at note 15), "in determining whether to issue licenses to new licensees". See, also, note 38, *supra*, which indicates that "new licensee" is an unfortunate choice of terms.

status has no necessary relationship to the question of whether they are “new” or successor licensees as between two license terms in the context of Section 15(a). In any event, there should be sufficient doubt as to whether “new licensees” in the context of *Section 7(a)* are identical to a “new licensee” in the context of Section 15(a), to merit a look at the legislative history.⁴⁵

Legislative History

Having concluded that a Section 8 “original licensee” may not be the same as a Sections 15(a)/22 “original licensee”,⁴⁶ we turn to the legislative history to ascertain the identities of the Section 7(a) “new licensees”. There are two principal aspects to scrutinize—the introduction of the Administration Bill, and the Pinchot/Lenroot/Jones amendment.

Upon its introduction, the Administration Bill provided in the first paragraph of Section 7, in pertinent part,

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities. . . .

Like Section 4(d) of the FWPA authorizing the Commission generally to issue licenses (which is now Section 4(e) of the FPA), there were no words expressly including or excluding successor licenses. The claims of the private power interests that the reference to “plans” for “developing” power limited

⁴⁵ Although Section 7(a) is concerned with choosing applicants as licensees, we note that the Commission is directed to give preference to applications (documents) of States and municipalities, and authorized (not consistently) to give preference “as between other applicants”. This is a further example of non-consistent language noted in other parts of this Opinion and order.

⁴⁶ They are the same only when the “original” or first licensee under a license retains its status of being the licensee through the expiration of that license, thus becoming the “original” or predecessor licensee of the successor licensee.

the preference to initial licenses, are totally unpersuasive. The plans were to be adapted "to conserve and utilize . . . navigation and water resources", which includes operation as well as construction, and, therefore, refers implicitly to successor licenses as well as initial licenses. Considering that "in issuing licenses", without limiting words, refers to all licenses, and considering the intent concerning preferences that was expressed in Merrill's memorandum of October 31, 1917, it appears that the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses.

After the introduction of the Administration Bill, the first paragraph of Section 7 was amended, first, so that the municipal preference would apply to the issuance of preliminary permits (which can happen, if at all, only prior to the issuance of an initial license), and second, so that the municipal preference would *not* apply to the issuance of initial licenses associated with outstanding preliminary permits. Considering that there were no words expressly including successor licenses, and that words were added to include preliminary permits and exclude initial licenses associated with outstanding preliminary permits, the application of the municipal preference to successor licenses became obscured through the successive amendments.

Eventually, the Pinchot/Lenroot/Jones amendment changed the pertinent language to read,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities. . . .

That amendment changed the context of the first 15 words significantly. Immediately prior to the amendment there still were no words expressly concerned with (either including or

excluding) the issuance of successor licenses and, consequently, the words of the Administration Bill "in issuing . . . licenses" continued to refer to all licenses. The words had been amended, however, to say "in issuing . . . licenses where no preliminary permit has been issued", thus excluding *initial* licenses that were associated with outstanding preliminary permits. But, as in the Administration Bill, they continued to apply silently to all successor licenses.

The Pinchot/Lenroot/Jones amendment introduced for the first time words that were expressly concerned with successor licenses. As a result, the first 15 words were limited in their application to preliminary permits and *initial* licenses, and the 11 words that were added applied exclusively to successor licenses. The official explanation, per Senate Report No. 180 (66th Congress, 1st Session), described this amendment as one of a general body of amendments that were "of a minor character" and made "more clear and certain the meaning of the House provisions."

The interpretation of the public power interests and the Commission staff counsel that "new licensees" are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation. The words were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment. The narrower interpretation of the private power interests that "new licensees" are limited to those not in possession, would have resulted in a substantive change and presumably would have been described as such in Senate Report No. 180. And the alternative justification of the private power interests that the amendment added a limited municipal preference on relicensing where none had existed before, also would have resulted in a substantive change and, additionally, runs counter to Merrill's memorandum of October 31, 1917, and other indicia of the existence of the preference.

Finally, the interpretation of the public power interests is consistent not only with the official explanation of the Pinchot/

Lenroot/Jones amendment, but also with the Merrill/Lee explanation of the FWPA as it emerged from the committee of conference and was passed by Congress and signed by President Wilson.

We turn, next, to the effects of interpreting "new licensees" one way or the other. Section 7(a) identifies three areas of potential competition for preliminary permits and licenses, as follows:

1. Preliminary permits
2. Initial licenses not associated with outstanding preliminary permits
3. Successor licenses

The three areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

Section 7(a) also describes two preferences, or standards, to be applied by the Commission in choosing among competing applicants in the foregoing three areas of competition. If the competitors are States or municipalities, the Commission is directed to give them preference over citizens and corporations if their plans are "equally well adapted". But "as between other applicants", or, stated another way, as among citizens and corporations *inter se* when the competitors are not States and municipalities, the Commission may give preference to the applicant with the "best adapted" plans.

The two preferences cover all of the possible combinations of competitors with the possible exception of competition among States and municipalities *inter se*. It could be argued that it was not necessary to cover such competition since the political process could be expected to resolve questions pertaining to the choice of the government entities that would develop water

power on behalf of the public.⁴⁷ But we believe that there is a silent prepositional phrase in the municipal preference, as follows:

. . . The Commission shall give preference to applications therefor by States and municipalities *over applications by citizens and corporations*. . . .

With the addition of that phrase, we construe the second preference "as between other applicants" to mean "as between applicants other than States and municipalities, on the one hand, and citizens and corporations, on the other hand". With that meaning, the second preference would be applicable to competition among States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal, preference would continue to be applicable to competition between States or municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors.

If "new licensees" are any licensees under a successor license, as the public power interests and the Commission staff counsel contend, the application of the two preferences to the three areas of competition will provide a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the "equally well adapted" or the "best adapted" standard to the issuance of all (a) preliminary permits, (b) initial licenses not associated with outstanding preliminary permits, and (c) successor licenses, depending upon whether any applicants are States or municipalities. And there will be no gaps in any situation, except as intended.

The private power interests' position, on the other hand, that "new licensees" exclude "original licensees", will produce absurd results as well as a regulatory gap.

⁴⁷ Whatever the expectation of Congress, we have experienced competitive licensings between States and municipalities *inter se*.

Counsel for the Hydro Group took the position in the oral argument (TR. 89-90) that under their view that "new licensees" exclude "original licensees", State and municipal "original licensees" *in possession* would not have a relicensing preference against citizen or corporation applicants *not in possession*. Since States and municipalities have an undisputed preference to preliminary permits and initial licenses, it is absurd to believe that Congress did not also give them a preference to successor licenses in those circumstances.

The private power interests also say that the municipal preference doesn't apply unless the "original licensee" in possession chooses not to file an application for a successor license—in which case a State or municipality not in possession could compete against a citizen or corporation not in possession, resulting in a routine application of the "equally well adapted" standard. It is even more absurd to believe that Congress gave States and municipalities *not in possession* a preference against citizens and corporations not in possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession.

The private power interests say, additionally, that if the "original licensee" in possession *does* file an application for a successor license, the municipal preference doesn't apply until the Commission first decides not to issue a successor license to the "original licensee". The problems with that position are threefold.

First, a State or municipality not in possession would nonetheless be competing against the "original licensee" in possession within a two-step relicensing procedure, one step to decide whether to issue the successor license to the "original licensee" in possession, and if not, the other to choose among

applicants not in possession. There is in fact no such two-step procedure.⁴⁸

Second, competition between a citizen or corporation in possession and a State or municipality not in possession clearly is not covered by the second preference of Section 7(a).⁴⁹ If it is not also covered by the municipal preference, as the private power interests contend, then the Commission would have no standard to apply in deciding whether to issue a successor license to the "original licensee" in possession.

And third, a decision to issue a successor license to the "original licensee" in possession would, in effect, provide a relicensing preference for the "original licensee", contrary to the position of counsel for the Hydro Group in the oral argument. A relicensing preference in favor of an "original licensee" in possession is irreconcilable with the absence of statutory words or legislative history indicating that such a preference exists, and, particularly, with the private power interests' emphasis on the "plain meaning" of the statute.

⁴⁸ While the private power interests rely on the 1968 amendments to the FPA because of Chairman White's statement to Congress, the fact is that those amendments were enacted to eliminate a three-step relicensing/takeover procedure, and the resulting procedure described in the legislative history of those amendments does not indicate that there would be two steps in relicensing. Indeed, Section 14(b), which was enacted in 1968, states that,

the Commission shall entertain applications [plural] for a new license and decide them in a relicensing proceeding [singular] pursuant to the provisions of section 15. . . .

suggesting that all pending applications are to be decided at the same time.

⁴⁹ If the second preference said, "in other situations," it would have been a catch-all. But the words, "as between other applicants," refer back to the combinations of competitors (State/municipal v. citizen/corporation) covered by the municipal preference, as distinguished from [sic] the areas of competition (permits and licenses) to which both preferences are applied.

1968 Amendments

Having determined that the interpretation of the public power interests and the Commission staff counsel is supported by the legislative history, and that the interpretation of the private power interests produces absurd results and leaves a regulatory gap, we turn to the claim that Congress in 1968 precluded a subsequent change in the Commission's administrative interpretation favoring the private power interests.⁵⁰

The private power interests would have us invoke a judicially-created doctrine that was called the "doctrine of reenactment" in *Association of American Railroads v. Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1977), at 493, a leading case that applied the doctrine. As its name implies, invocation of the doctrine requires a threshold reenactment of a statutory provision which, in this case, is Section 7(a) of the FPA. Although the first paragraph of Section 7 of the FWPA was reenacted in 1935 as Section 7(a) of the FPA, the private power interests do not base their claim on that reenactment and, in any event, the other requisites are not present with respect to that reenactment. They base their claim on the 1968 legislation amending Section 7 of the FPA to add Section 7 (c), but not reenacting Section 7(a).

⁵⁰ One of the most troublesome aspects of that interpretation, if not the most troublesome one, is that the General Counsel's rationale has not surfaced in this proceeding. As a result, we have no basis for judging the merits of, or being persuaded by, his interpretation, other than through the documents submitted to him, namely, (1) the legal memorandum transmitted to the General Counsel on behalf of some private power interests with the O'Kelly letter dated December 19, 1966, and (2) the Ely opinion letter to the American Public Power Association dated March 24, 1967. Copies of the foregoing documents were transmitted to the Commission as attachments to the Assistant General Counsel's memorandum dated March 28, 1967, which stated, simply, "our view of the correct interpretation of section 7(a) . . . is similar to that contained in the O'Kelly memorandum."

Under the "doctrine of reenactment", when Congress is made aware of an administrative interpretation of a statutory provision and gives an affirmative indication of an intent not to change the meaning of the provision, Congress thereby precludes a subsequent change in the administrative interpretation of that provision. In addition to the requisite reenactment, *Association of American Railroads* suggests, at 493, that the administrative interpretation should be a "longstanding and unquestioned interpretation" in the course of the work of an agency, which we would distinguish from an administrative interpretation recited to Congress at committee hearings. *Association of American Railroads* also suggests, at 493, not only that Congress must have expressed its satisfaction with the interpretation, but also must have "affirmatively concluded that it should not be changed for the time being".

Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978), is, perhaps, the most recent Supreme Court decision on the "doctrine of reenactment". The Securities and Exchange Commission (SEC) had authority under the Securities and Exchange Act of 1934 to summarily suspend the trading of securities on national exchanges for a period of 10 days, and it consistently interpreted its authority as permitting trading suspensions for successive 10-day periods, resulting in some long suspensions. In 1964 Congress amended the Securities Exchange Act of 1934 to grant the SEC the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities on national exchanges, and in 1975 Congress further amended that Act to consolidate the two resulting statutory provisions into one. The SEC informed Congress of its practice, in conjunction with the 1964 amendment, and the Senate Committee on Banking and Currency indicated in its report (Senate Report No. 379, 88th Congress, 1st Session) that it understood and did not disapprove the SEC's practice. Nonetheless, the Supreme Court struck down the practice and refused to apply

the "doctrine of reenactment", stating, at 120, that the SEC made its practice known to at least one committee

at a time when the attention of the committee and of the Congress was focused on issues [the expansion of powers over securities on national exchanges to securities traded over-the-counter] not directly related to the one presently before the Court. Although the section in question was re-enacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval [that is required].

We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

On the basis of the foregoing two decisions, among others not cited, we conclude that the private power interests' position is deficient in at least the following respects, any one of which is cause for declining to invoke the "doctrine of reenactment": (1) There was no reenactment of Section 7(a) after the Commission made its interpretation known to the committee. (2) The committee and Congress in 1968 were focusing on the non-controversial proposed procedures interrelating relicensing and takeover, not directly related to the controversial matter of the municipal preference. (3) Congress, and particularly the House (as distinguished from the Senate committee), was not shown to have been *generally aware* in 1968 of the Commission's interpretation. (4) The Commission's 1968 interpretation was not and is not a long-standing work practice.⁵¹

⁵¹ The Commission's interpretation of the municipal preference in a relicensing contest is inherently incapable of being a long-standing work practice because, as indicated, (1) the vast majority of initial licenses were issued for 50-year periods and did not begin to expire until the 1970's, and (2) this declaratory order proceeding was initiated for the express purpose of determining what the work practice will be.

Their position is so materially deficient in so many respects that we believe that it is appropriately characterized as a "red herring".

THE MUNICIPAL PREFERENCE IN RELICENSING DECISIONS

Section 7(a) of the FPA contains the standards to be applied by the Commission in choosing between or among applicants who are competing for preliminary permits and licenses for the same water resources. One standard is the "municipal" preference, which applies to competition between States or municipalities, on the one hand, and citizens or corporations, on the other.⁵² If the Commission finds that the plans⁵³ of the State or municipality are "equally well adapted" as those of the citizen or corporation "to conserve and utilize in the public interest the water resources of the region", the Commission is directed by the statute to issue the preliminary permit or license to the State or municipality.

Several parties, including the staff counsel, interpret the municipal preference of Section 7(a) to be a tie-breaking concept. We agree. Simply put, for a preliminary permit or an

⁵² In the other, as between citizens and corporations, *inter se*, and States and municipalities, *inter se*, "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

⁵³ The words "plan" and "plans" are used in several contexts in the FPA. The references in Section 7(a) to "equally well adapted" and "best adapted" "plans", as well as the reference in Section 10(a) to "comprehensive plan", run to the physical and nonphysical aspects of proposals for the development, conservation, and utilization of regional water resources. The references in Sections 9(a) and 10(a), on the other hand, to maps, "plans", and specifications, run more narrowly to the physical and technical drawings, plans and specifications of a project.

initial license, if the competing applications are equal with respect to advancing the public interest, the tie is broken by granting to the State or municipal applicant the statutory preference.⁵⁴ We have determined that this preference similarly holds in relicensing cases.

Congress intended that a State's or municipality's entitlement to preference should depend upon an evaluation by the Commission of public interest factors reflected in the competing plans before the Commission. As Congressmen Doremus and Raker said on the floor of the House (Dove, at 623-5):

MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.

MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

As discussed in previous sections, Congress envisioned probable private development of water power resources with ultimate public ownership possible.⁵⁵ The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects.

⁵⁴ States and municipalities have a special opportunity under Section 7(a) to modify their plans to conform them to or make them better than any competing plans. Therefore, the municipal preference of Section 7(a) assures a State or municipality of being the successful applicant if it is able and willing to meet its competitors' plans on the merits. See 18 C.F.R. 433(g).

⁵⁵ Senate Report No. 180, 66th Congress, 1st Session, quoted on page [40a].

Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate the facilities.

As early as 1908, President Roosevelt's landmark Rainy River veto message sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time." And Merrill's memorandum of October 31, 1917, called for statutory "provisions that will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy."

Merrill's proposal for a purely discretionary municipal preference⁵⁶ was modified in its movement through Congress into a preference that is mandatory should the Commission, in the exercise of its judgment, determine, in the words of Congressman Doremus, that "the plans are adequate *to serve the public interest*". (Emphasis added.)

Congress in 1920 was focusing on our nation's water power sites and equated the "public interest" with the prompt development of those sites. But Congress provided for the possibility of eventual public ownership even where the private interests undertook the responsibility for that development. This possibility was made dependent upon an evaluation by the Commission, at the time a license expires, of how the public interest would best be served by choosing among the various alternatives.

⁵⁶ See the first paragraph of Section 7 of the Administration Bill, quoted on page [33a-34a].

In sum, the Commission finds and hereby declares that the statutory scheme of the FPA is one in which a municipal or State applicant competing for a successor license against a citizen or corporate applicant is entitled by Section 7(a) to a preference if the Commission finds that the plans of the State or municipality are, in the words of Section 7(a),

equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

Thus, in determining which competing applicant will receive a successor license, it is important to look not only at the "tie-breaker rule", but also to how the Commission will determine whether the plans are "equally well adapted". Put differently, whether there is a tie to be broken by municipal preference will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest.

The Commission does not have before it a record upon which a definitive statement can be made as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare. However, the record in this proceeding, the language of the statute itself, and the pertinent legislative history provide a basis for some generalizations about the public interest determination.

First, we believe the statute contemplates a broad assessment, evaluating both physical and nonphysical considerations when the public interest is assessed. Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense⁵⁷ to make beneficial public use of our nation's waterways. All

⁵⁷ See Footnote 53.

licensed water power projects are required by Section 10(a)⁵⁸ to be best adapted physically and technically to utilize our nation's water resources for the benefit of the public and, to the extent that they also conserve those resources, to do so for the benefit of the public. We are specifically authorized by Section 10(a) to require modifications to secure plans (in the physical or technical sense) that will be best adapted to a comprehensive plan (in the nonphysical as well as physical sense) for beneficial public uses. Thus, a project must be "best adapted", physically and technically, to beneficial public uses no matter which applicant we select.

During the oral argument, the Commission staff counsel suggested (Tr. 146) that our assessment of the "public interest" should be as broad as the commerce clause of the Constitution, and the general counsel of the American Public Power Association expressed his agreement (Tr. 187). Without adopting that particular interpretation here, we agree with the characterization expressed by the attorney for Utah Power and Light Company (Tr. 190) that our decision ought to take into account "the public interest in its broadest sense."

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as

⁵⁸ Section 10 provides, in pertinent part,

All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; *and if necessary in order to secure such plan the Commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.* [Emphasis added.]

economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Second, we believe that Congress did not intend the "public interest" to be static or frozen as of 1920. To the contrary, the legislative history of the FWPA shows that one of the reasons why Congress rejected perpetual licenses was to reserve for future generations the decisions as to which segments of the public would receive the benefits of our nation's water power resources. We believe that the "public interest" will vary with the circumstances and needs of the time period in which it is considered.

Third, public interest implications of competition in relicensing decisions can be even more complex and complicated than for initial licenses. When issuing *initial* licenses for unconstructed projects, we are permitting the utilization of then unused or underused water resources. Our choice between public and private applicants for *initial* licenses for unconstructed projects results in allocating the benefits of relatively inexpensive renewable sources of energy to either a segment of the public associated with the public applicant, or the private applicant or a segment of the public associated with it, none of whom are then receiving those benefits. But our choice between public and private applicants for *successor* licenses may result in *reallocating* the benefits of water power resources then in use from the private applicant, or a segment of the public associated with it, to the public entity and the segment of the public associated with the public entity. Moreover, transfer itself may have some effects, possibly disruptive, which are not present with initial licenses.

Fourth, our relicensing decisions may have important implications for the concentration and distribution of the benefits of hydropower, and it is important to keep in mind that FWPA was an outgrowth of a widespread belief—and an associated political movement—that had a basic tenet that the

benefits of hydropower should be spread widely. A basic goal of the FPA is to assure that hydropower benefits are enjoyed by as much of the public as possible.

As previously noted, it will be necessary to develop the information on which to decide whether Bountiful, Santa Clara and other municipalities are entitled to a preference, in competing for a successor license, and it is important that the Commission be provided with an adequate basis upon which to examine broad public interest considerations.

Parties are encouraged to address such additional areas of consideration as they contend are pertinent to our selection of licensees for particular successor licenses. We emphasize, in this connection, that the "public interest" standard of Section 7(a) has never been litigated in court and has been addressed in only a few Commission decisions.⁵⁹ It would, therefore, be premature to address the applicability, relevancy and materiality of particular areas of consideration. We would expect such factors to vary from case to case.

⁵⁹ Although it has never been disputed that the municipal preference is applicable to initial licensings, and although the Commission has been issuing initial water power licenses for almost 60 years, there are no court decisions and few Commission decisions on the "public interest" standard of Section 7(a). In *Holyoke Water Power Co., et al.*, Project Nos. 2004 and 2014, 8 FPC 471 (1949), wherein it was said, at 487, that the preference under Section 7(a) "is not an absolute one", a municipality that was unable and unwilling to meet its competitor's plans was denied an initial license. And in *Pacific Northwest Power Company*, Project Nos. 2243 and 2273, 31 FPC 247 (1964); affirmed *sub nom Washington Public Power Supply System v. Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966); reversed on other grounds *sub nom Udall v. Federal Power Commission*, 387 U.S. 428 (1967), a Commission majority indicated by way of dictum, at 270, that after a hearing

. . . we would then determine if preference accrues to the [municipality], and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these [competing licensing] applications. . . .

In the final analysis, it is left to the Commission to determine the "public interest" in the light of the facts and contentions in each particular application. The processing and consideration of the pending applications in which States and municipalities, and citizens or corporations, have requested successor licenses for the same water resources should go forward in the light of this declaratory order. Finally, the Commission's Opinion Nos. 36 and 36A (*Escondido Mutual Water Company, et al.*, Project No. 176), involving a successor license and discussed briefly in Footnote 10, are subject to a pending appeal.

By the Commission.

(S E A L)

/s/ Kenneth F. Plumb,
KENNETH F. PLUMB
Secretary

16 U.S.C. §§800, 807 and 808**§800. Issuance of preliminary permits or licenses [FPA § 7]****(a) Preference**

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license

to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

**§ 807. Right of Government to take over project works
[FPA § 14]**

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission

under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

- (b) Time of applications for new licenses; relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its¹ does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

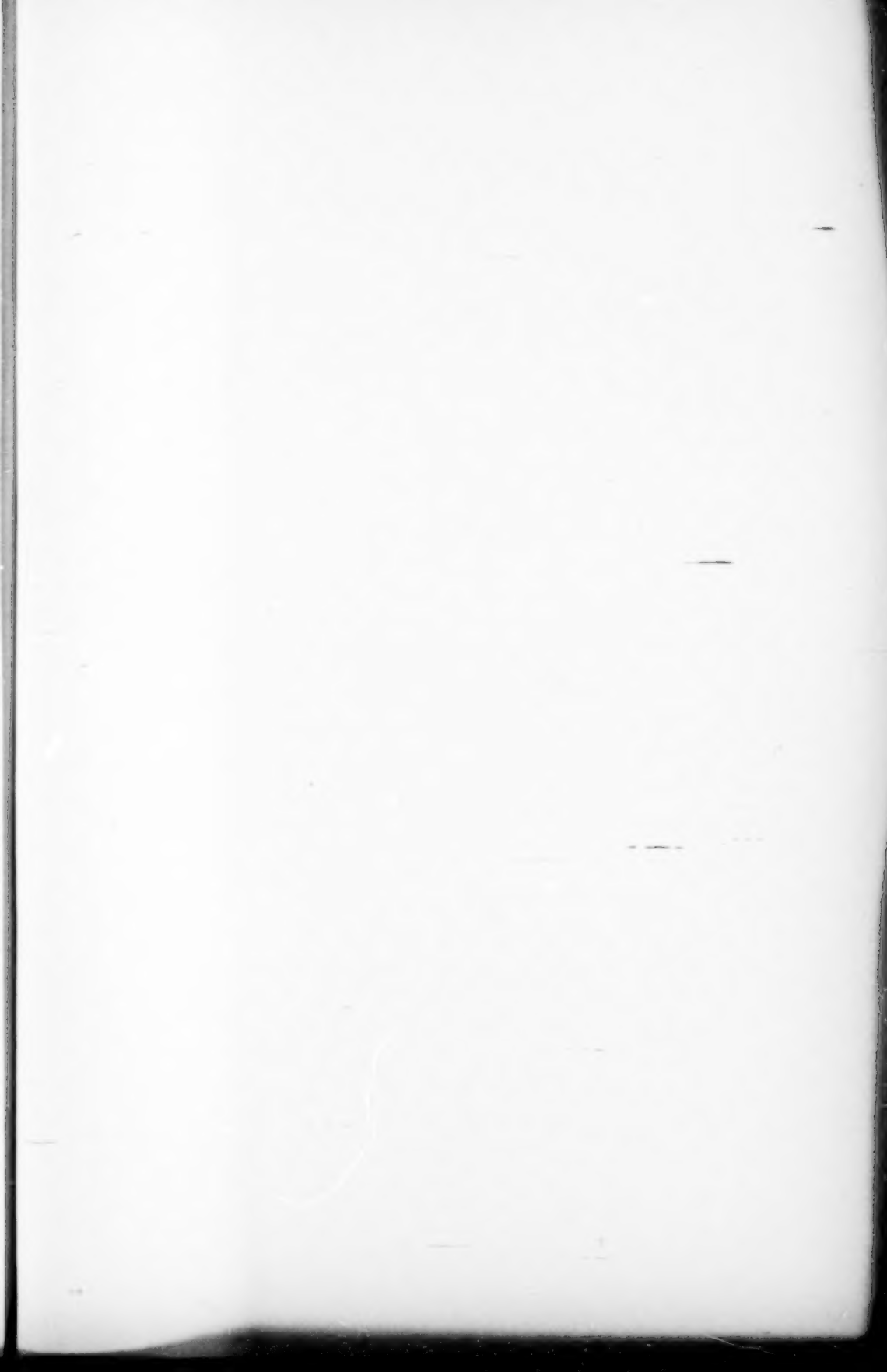
¹ So in original. Probably should read "it".

§ 808. New licenses and renewals; compensation of old licensee; licenses for nonpower use; recordkeeping [FPA § 15]

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purpose, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the conditions that the new licensee shall, before taking possession of the facilities en-

compassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provision of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alternation, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.



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H. F. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF OF RESPONDENT AMERICAN PUBLIC
POWER ASSOCIATION IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI**

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November 27, 1987

16 pgs

QUESTIONS PRESENTED

1. Did the District of Columbia Circuit *en banc* majority err in holding that a final administrative order cannot preclude relitigation of the same issue between the same parties?

2. Does preclusion doctrine retain any value if, as the District of Columbia Circuit *en banc* majority held, a tribunal may *sua sponte* ignore a decision on the same issue and between the same parties when it believes that the decision was in error?

3. Did the District of Columbia Circuit *en banc* majority err in holding that an administrative declaratory order cannot, as required by 5 U.S.C. § 554(e), actually "terminate a controversy" or "remove uncertainty"?

PARTIES TO THE PROCEEDINGS BELOW

Respondent American Public Power Association is a national service organization composed of more than 1,750 municipal and state-owned electric utilities in 49 states. It was an intervenor in the proceedings before both the Courts of Appeals and the Federal Energy Regulatory Commission in this matter. Its members include municipalities, state power authorities and districts, and other publicly owned utilities that generate, transmit, and distribute electricity. A list of the parties in the Court of Appeals appears at p. ii of the Petition for a Writ of *Certiorari* filed by the Clark-Cowlitz Joint Operating Agency.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-771

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
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On a Petition for a Writ of Certiorari to the
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**BRIEF OF RESPONDENT AMERICAN PUBLIC
POWER ASSOCIATION IN SUPPORT OF THE
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REASONS FOR GRANTING THE WRIT

On occasion, cases arise whose specific outcome is of no great moment to nonparties, but which provide the vehicle for a holding that touches the fundamentals of the American judicial system (*e.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

This Court has repeatedly recognized that application of preclusion doctrines "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions," *Montana v. United States*, 440 U.S. 147, 153 (1979), and "essential to the maintenance of social order," *Nevada v. United States*, 463 U.S. 110, 129 (1983). Preclusion "is a rule of fundamental and substantial

justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

This case concerns whether preclusion attached to the decision of the Federal Energy Regulatory Commission (the "Commission") in *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337 (Opinion No. 88), *reh'g denied*, 12 F.E.R.C. (CCH) ¶ 61,179 (1980) (Opinion No. 88-A), *aff'd sub nom. Alabama Power Company v. Federal Energy Regulatory Commission*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983) (hereinafter "*Bountiful*"), so as to prohibit the Commission from taking a contrary position in the proceedings on the Merwin hydroelectric project in *Pacific Power & Light Company*, 25 F.E.R.C. (CCH) ¶ 61,052 (Opinion No. 191), *reh'g denied*, 25 F.E.R.C. (CCH) ¶ 61,290 (1983), *aff'd sub nom. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074 (D.C. Cir. 1987) (*en banc*) (hereinafter "*Merwin*").

In the instant case, the *en banc* majority reviewing *Merwin* ruled that the Commission's declaratory order in *Bountiful* did not preclude the agency from subsequently reconsidering (and overruling) the same purely legal issue between the same parties despite the absence of any changed factual circumstances. In doing so, the *en banc* majority emasculated the requirements of preclusion in administrative proceedings, established principles that would allow any tribunal entitled to deference on review to ignore preclusion, and effectively nullified the provision of the Administrative Procedure Act, 5 U.S.C. § 554(e), that permits an agency to issue declaratory orders "to terminate a controversy or remove uncertainty."¹

¹ The extent to which the *en banc* majority chose to ignore this Court's decisions on preclusion is shown by its statement that "[i]t is well settled that the determination of an issue of law should not be accorded preclusive effect if such effect would result in 'inequitable administration of the law.'" *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (*en banc*). It is hard to imagine a position more diametrically opposed to the decision and rationale of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981):

The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a

(footnote continues)

The most striking example of the destruction of fundamental principles of law by the *en banc* decision can best be illustrated hypothetically. Under the rationale of the *en banc* majority reviewing *Merwin*, review by any court of an agency's interpretation of a statute is limited to the reasonableness of that interpretation, and the decision is merely dicta with respect to contrary interpretations. Therefore, even if this Court had earlier granted *certiorari* in *Bountiful* and unanimously determined that the statutory construction reached by the Commission in *Bountiful* was the *only* reasonable interpretation, this Court's hypothetical decision—to the extent it was such "dicta"—would not have precluded the Commission from adopting a contrary interpretation in subsequent litigation between parties to the original *Bountiful* decision.² Certainly, neither the Solicitor General nor any party seeking or opposing the grant of a writ of *certiorari* in *Bountiful* made any such suggestion.³ Indeed the Solicitor General, on behalf of the Commission, informed this Court in *Bountiful* "that virtually all of the investor-owned utilities that own and operate federally licensed hydroelectric facilities were parties to the case." Therefore, he wrote, "[u]nder traditional *res judicata* principles if this Court denies *certiorari* and the court of appeals' judgment affirming the Commission's declaratory order be-

(footnote continued)

particular case. *There is simply no principle in law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.*

Moitie at 401 (emphasis added).

² While we are aware of the danger of attempting to discern the thinking of Justices White and Blackmun, who voted to grant *certiorari* to the Eleventh Circuit in *Bountiful*, we do not regard as likely the possibility that they, or indeed any Justice, thought that this Court was being asked to render an essentially advisory opinion, which the Commission would then be free to disregard in subsequent proceedings between the parties.

³ The brief for the Commission filed by the Solicitor General stated that the issue was the definitive and binding determination of the meaning of the statute:

The question presented is whether the statute requires the Commission in a license renewal proceeding, to give a state or municipal applicant a preference over the original licensee's renewal application.

(footnote continues)

comes final, these entities may be bound by the Commission's order in any future relicensing proceeding." ⁴ S.G. Brief at 7-8.

(footnote continued)

Brief of the Federal Energy Regulatory Commission at I, *Utah Power & Light Co. v. Federal Energy Regulatory Commission*, 463 U.S. 1230 (1983) (No. 82-132) (hereinafter "S.G. Brief").

That was the precise issue answered in the affirmative by the Court of Appeals for the Eleventh Circuit reviewing *Bountiful*. Yet, the current position of both the Commission and the *en banc* majority is that the Commission was not required—even when confronted by the parties to the *Bountiful* litigation—to recognize the existence of such a preference.

⁴ Thus, the Solicitor General asserted that there was "a serious question" as to whether the issue of statutory interpretation "can be subjected to further judicial scrutiny in a subsequent case." S.G. Brief at 8. There was certainly no suggestion that any party to *Bountiful* would not be precluded in the relicensing proceedings.

The Solicitor General's concern that the traditional rules of preclusion would bind the entire industry and therefore prevent the Commission from ever revisiting its *Bountiful* determination has now become theoretical with the enactment of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 (1986), 100 Stat. 1243 (1986), and need not be addressed by this Court.

Furthermore, the tribunal on other occasions will have ample opportunity to deal with this potential problem. For example, a future Commission could decline to grant intervenor status to the entire industry and instead limit it to the party or parties initially seeking the declaratory order while permitting other interested entities to participate as amicus. Thus, the tribunal can at the outset ensure that preclusion will operate only as to a limited number of parties, allowing itself the ability in subsequent proceedings to deal with others under the less stringent requirements of *stare decisis*. In *Bountiful*, however, the Commission permitted intervention and made clear that it intended its determination to apply to all pending cases:

There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change depending on the factual setting.

FERC Brief to the Eleventh Circuit, J.A. at 56 n.4, *reprinted in* Clark-Cowlitz Joint Operating Agency's Petition for Writ of *Certiorari* at 8. Even if somehow preclusion were not mandated for all parties to *Bountiful*, at a minimum preclusion clearly barred relitigation among the contestants in the small number of then-ongoing relicensing proceedings who participated in *Bountiful* specifically to obtain a conclusive interpretation which would govern their proceedings. Others who chose to participate as parties rather than seeking amicus status deliberately did so in order to obtain the benefits of a preclusive determination.

A. **THE *EN BANC* MAJORITY'S FAILURE TO RECOGNIZE THE PRECLUSIVE EFFECT OF THE COMMISSION'S *BOUNTIFUL* ORDER DISREGARDS FUNDAMENTAL REQUIREMENTS OF PRECLUSION AND LEAVES THE VAST MAJORITY OF ADMINISTRATIVE DECISIONS OPEN TO RELITIGATION IN PROCEEDINGS BETWEEN PARTIES TO THE ORIGINAL DETERMINATION.**

The majority of the *en banc* court reviewing *Merwin* correctly recognized the basic principles of preclusion:

The principle underlying the rule of claim preclusion is that a party who *once has had a chance* to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle—that one who has *actually litigated an issue* should not be allowed to relitigate it—underlies the rule of issue preclusion.

Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (*en banc*) (affirming *Merwin*). However, the *en banc* majority then proceeded to misapply these principles by focusing solely on the decision of the Eleventh Circuit in *Alabama Power Company v. Federal Energy Regulatory Commission*, 685 F.2d 1311 (11th Cir. 1982) (affirming *Bountiful*), *cert. denied*, 463 U.S. 1230 (1983), while completely ignoring the fact that the Commission's original decision itself precludes relitigation. The Commission determined in *Bountiful* that the Federal Power Act, 16 U.S.C. § 800(a)(1982), required application of the public preference in all relicensing proceedings. If that order had become final without appeal, it would have had substantive preclusive effect on the parties. The affirmance by the Eleventh Circuit did not convert the Commission's initial order from a determination on the merits into a determination based merely on deference. There is no basis in logic or law for the proposition that an appeal that results in a unanimous affir-

mance in any way detracts from the preclusive effect of an agency's original decision.⁵

Ignoring the necessarily preclusive effect of the Commission's *Bountiful* decision, the majority of the *en banc* court reviewing *Merwin* held that the Eleventh Circuit had determined only that the Commission's *Bountiful* interpretation was reasonable, and therefore that the Eleventh Circuit could not have determined the reasonableness of the contrary statutory interpretation which was not before it.⁶ The *en banc* majority's myopic focus on the Eleventh Circuit's limited standard of review points logically to the absurd conclusion that even if this Court had also affirmed *Bountiful*, based on the same standard of review, that decision could not, as a matter of law, have precluded the Commission from flip-flopping and declining to apply the *Bountiful* determination to proceedings involving the *Bountiful* parties.⁷

Indisputably, the Commission in *Bountiful* did determine which of the two interpretations was correct. The Commission's decision was intended, in the words of the Administrative Procedure Act, 5 U.S.C. § 554(e), "to terminate a controversy" and "to remove uncertainty." The parties all regarded it as doing so. The Eleventh Circuit's affirmance of *Bountiful* and this Court's denial of the petitions for *certiorari* made the

⁵ If the *en banc* decision is allowed to stand, it raises the spectre that some counsel will seek review of agency decisions when they anticipate a change of the Executive Branch (and therefore of the composition of a Commission) for the sole purpose of reducing a preclusive decision on the merits into an ignorable decision based on deference. But this flies in the face of the basic purpose of preclusion, which is to prohibit such relitigation both for the benefit of the parties and to prevent needless impositions on a strained judicial system.

⁶ The *en banc* majority acknowledged the Eleventh Circuit's view that the interpretation later adopted by the Commission in *Merwin* "would lead to absurd results," *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1079 n.4 (D.C. Cir. 1987) (*en banc*), but characterized that view as "dicta" since the "reviewing court . . . had only to determine the reasonableness of FERC's prior interpretation, not the correctness of competing interpretations." *Id.*

⁷ This situation would apply to the vast majority of agency decisions because the standard for reviewing their decisions is generally deferential under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or the substantial evidence rule.

Commission's decision final and precluded relitigation between the parties on the issue decided in *Bountiful*.⁸

B. THE *EN BANC* MAJORITY'S HOLDING THAT PRECLUSION ONLY PREVENTS THE LOSING PARTIES TO THE FIRST DECISION FROM REARGUING ISSUES WHICH THEY HAD LOST, BUT DOES NOT PREVENT THE TRIBUNAL FROM REEXAMINING THE FIRST DECISION, RENDERS ILLUSORY AND VALUELESS THE REPOSE THAT PRECLUSION PRINCIPLES ARE INTENDED TO BESTOW ON THE PARTIES TO THE FIRST DETERMINATION.

The majority of the *en banc* court reviewing *Merwin* has trivialized preclusion doctrine by holding that preclusion binds only adverse parties and not the tribunal before which they appear. The *en banc* majority stated that:

The doctrine of preclusion is meant to prevent parties from rearguing issues they have already lost. But Pacific Power has never argued that *Bountiful* did not apply to it. It was the *decisionmaker*, FERC, that changed its position.

Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (*en banc*) (affirming *Merwin*) (emphasis in original). Thus, according to the *en banc* majority, the tribunal is always free to change its position as to certain parties even when those parties are before it but are themselves precluded from urging such a change. If this is the law, the salutary benefits of preclusion so

⁸ The treatment of preclusion by the *en banc* majority reviewing *Merwin* would be equivalent to saying that there is no preclusion among the parties following a jury verdict of negligence and an affirmance by a court of appeals determining that the evidence was sufficient to go to a jury. Under the *en banc* court's rationale, there would be no preclusion because the court of appeals did not decide the mirror-image issue of whether a verdict of "no negligence" was legally permissible. Applying this reasoning in an overwhelming number of cases arising either in an agency or a district court, review by a court of appeals would deny preclusion to the initial determination of the agency or court.

often emphasized by this Court are illusory indeed.⁹ Any tribunal determined to change its own decision could do precisely what the Commission did in *Merwin*—reaching an opposite result and not giving preclusive effect to a prior decision on the same legal issue between the same parties. But the basic purpose of preclusion is to settle the issue between the parties. Indeed, as the Court has emphasized, preclusion is fully applicable where the first decision was wrong. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). It is simply inconceivable that the decision of this Court in *Moitie* turned on whether the tribunal acted *sua sponte* rather than in response to the urging of the party that had previously lost.

C. THE DECISION OF THE *EN BANC* MAJORITY REVIEWING *MERWIN* NULLIFIES THE BENEFICIAL PURPOSE OF THE DECLARATORY ORDER SECTION OF THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act, 5 U.S.C. § 554(e), provides that:

The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

The Commission, in issuing its *Bountiful* declaratory order, did all that was within its power to “terminate a controversy” and “remove uncertainty.” However, under the holding of the *en banc* majority in *Merwin*, it is beyond an agency’s power ever to issue a declaratory order that must be binding on the parties to it, because the application of that order will necessitate a separate proceeding in which the declaratory order will be subject to collateral attack.

⁹ See, e.g., *Nevada v. United States*, 463 U.S. 110 (1983); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); *Montana v. United States*, 440 U.S. 147 (1979).

The *en banc* majority concedes that the Commission's order in *Bountiful* is final and thus immune from direct attack. It then treats *Merwin* as a collateral proceeding, holding that both the claim and issue in *Merwin* are somehow different from those in *Bountiful*. *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (en banc). To style *Merwin* as a collateral proceeding, however, is to ignore the essence of a declaratory order. In *Bountiful*, the applicants sought the determination of a legal issue that would affect their pending licensure applications. In *Merwin* they sought, for the first time, the application of that legal determination to the very factual circumstance anticipated in the declaratory order.

The legislative history makes it crystal clear that administrative declaratory orders were intended to be the administrative equivalent of judicial declaratory judgments and were likewise intended to bind the parties:

The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts.¹⁰ Such orders, if issued, would not bind those not parties to them or determine subject matter not presented.

Administrative Procedure Act, Report of the Committee on the Judiciary, H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 233, at 263.

¹⁰ The federal Declaratory Judgment Act provides that a declaratory judgment shall have the force and effect of a final judgment or decree. The very purpose of this remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by *res judicata*. Denial of any preclusive effect, indeed, would leave a procedure difficult to distinguish from the mere advisory opinions prohibited by Article III.

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4446 at 397-98 (1981) (footnotes omitted). Here, the *en banc* majority of the District of Columbia Circuit treated the decision of the Eleventh Circuit reviewing *Bountiful* as if it had been advisory.

The *en banc* majority ignores the fact that their holding effectively nullifies the statutorily declared purpose of administrative declaratory orders. The *en banc* dissent recognizes the prospect that such orders may be transformed into "mere dress rehearsals whose result as to the parties is subject to complete reversal in a subsequent adjudication." *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1099-1100 (D.C. Cir. 1987) (dissent).

CONCLUSION

The *en banc* majority not only has shattered preclusion doctrine but also has ignored the command of Congress by making it possible for an administrative agency to issue a declaratory order that terminates no controversy and removes no uncertainty. This *en banc* decision by the most influential court of appeals in administrative matters should not be allowed to destroy fundamental aspects of law. Therefore, the American Public Power Association respectfully urges that the Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT PACIFIC POWER & LIGHT COMPANY'S
BRIEF IN OPPOSITION TO
ISSUANCE OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether res judicata principles are applicable to an administrative decision on "a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case."

2. Whether the Court of Appeals for the District of Columbia Circuit was correct in affirming the Federal Energy Regulatory Commission's decision that there was no municipal preference in hydroelectric-project relicensings prior to passage of the Electric Consumers Protection Act of 1986.

3. Whether consideration of relative economic impacts in hydroelectric-project relicensing proceedings was mandated by the FERC's *City of Bountiful, Utah* decision, as well as subsequently being required by the Electric Consumers Protection Act of 1986.

PARTIES TO THE PROCEEDINGS BELOW

Respondent Pacific Power & Light Company is an investor-owned electric utility which serves retail electric customers in the states of Oregon, Washington, Idaho, Montana, Wyoming and California.* Pacific Power is the owner and operator of the Merwin Hydroelectric Project on the Lewis River in Washington State. Power from the Merwin Project is used to serve Pacific Power's customers' electricity needs.

*"Pacific Power & Light Company" is an assumed business name for the electric operations of PacifiCorp, a Maine corporation. PacifiCorp has the following subsidiaries: PC/UP&L Merging Corp.; PACE Group, Inc.; Pacific Relocation Service Company; Wyopac Services, Inc. All of the following enterprises are affiliated with Pacific Power & Light Company as direct or indirect subsidiaries of Inner PacifiCorp, Inc., a wholly owned subsidiary of PacifiCorp: Astoria Development Corp.; Pacific Development (Lloyd Building), Inc.; Pacific Development (Lloyd 500), Inc.; Pacific Development (Lloyd General I), Inc.; Pacific Development (Lloyd General II), Inc.; Pacific Development (Lloyd Midrise), Inc.; Pacific Development (Lloyd Tower), Inc.; Pacific Development (Property), Inc.; NERCO, Inc.; PacifiCorp Credit, Inc.; Hyster Credit Corporation; Hyster Credit, Ltd.; PacifiCorp Business Credit, Inc.; PacifiCorp Capital, Inc.; PacifiCorp Leasing, Inc.; Systems Leasing Corporation (dba Municipal Leasing Corporation); Government Investment Associates, Inc.; Government Systems Advisors, Inc.; Government Systems Integration Corporation; Municipal Leasing Corporation; PacifiCorp Finance, Inc.; Northern Leasing Company, Inc.; PFI International, Inc.; PacifiCorp Trans, Inc.; Pacific Investment Enterprises, Inc.; Pacific Generation Services, Inc.; ONSITE Energy, Inc.; Pacific Resource Management, Inc.; Pacific Telecom, Inc.; Western Distribution Services, Inc.; Willamette Development Corp.; Alascom, Inc.; Bethel Cablevision, Inc.; Cascade Autovon Company; Cencom, Inc.; Cencom Leasing Co., Inc.; Cencom of Wisconsin, Inc.; International Communication Services, Inc.; Valley Video Systems, Inc.; Constant Broadcasting Company; Gem State Utilities Corporation; Eagle Telecommunications Inc./Colorado; Eagle Valley Communications Corporation; Inter Island Telephone Company, Inc.; MVI Corp.; MultiVisions, Inc.; MultiVisions, Ltd.; Northwestern Telephone Systems, Inc.; Pacific Telecom Nonregulated Holdings, Inc.; Associated P&C Engineers, Inc.; Audio Group, Inc.; CableBus Systems Corporation; Eyedentify, Inc.; Cardkey Systems, Inc.; Cardkey Systems, Ltd.; Sycor, Inc.; Flight Dynamics, Inc.; Arnav Systems, Inc.; Silver Instruments, Inc.; National Gateway Telecom, Inc.; FTC Communications, Inc.; UpSouth Corporation; Norcom Construction, Inc.; Pacific Telecom Construction Company; Ron Morris Corporation; Sertel, Inc.; Tel Com Construction Co.; Paccom Leasing Corporation; Pacific Telecom Cable, Inc.; PTI Alltelecom, Inc.; PTI Harbor Bay, Inc.; Shared Use Network Services, Inc.; T.U. International, Inc.; Pacific Telecom Service Company; Peninsula Telecommunications, Inc.; Peninsula Telecommunications Sales and Service; PTI Transponders, Inc.; Rose Valley Telephone Company; Telephone Utilities, Inc.; Telephone Utilities of Alaska, Inc.; Telephone Utilities of Eastern Oregon, Inc.; Telephone Utilities of the Northland, Inc.; Telephone Utilities of Oregon, Inc.; Telephone Utilities of Washington, Inc.;

(footnote continues)

The original federal license for the Merwin Project expired in 1978, and Pacific Power's application for relicense triggered the proceedings before the Federal Energy Regulatory Commission. A list of the parties in the Court of Appeals appears at p. ii of the Petition for Writ of Certiorari filed by the Clark-Cowlitz Joint Operating Agency.

(footnote continued)

Telephone Utilities of Wyoming, Inc.; Western Services, Inc.; NERCO Advanced Materials, Inc.; Spectrum Technology, Inc.; NERCO Coal Corp.; Antelope Coal Company; Associates Mining Company; Glenrock Coal Company; NDG, Inc.; NERCO Coal International, Inc.; NERCO Coal Sales Company; NERCO Eastern Coal Company; NERCO Energy Services Company; NERCO Eurosales, Inc.; MITNER Joint Venture; Northern Coal Transportation Company; P-V Mining Company, Inc.; Pacific Minerals, Inc.; Bridger Coal Company (a joint venture); Prospect Land and Development Company, Inc.; Resource Development Co., Inc.; Sequatchie Valley Coal Corporation; Spring Creek Coal Company; Western Minerals, Inc.; Decker Coal Company (a joint venture); NERCO Minerals Company; IBEX Mining Company; NEDCO, Inc.; NERCO DeLamar Company; NERCO Metals, Inc.; Alligator Ridge Joint Venture; NERCO Minerals — Canada, Ltd.; NERCO Con-Mine, Ltd.; Resource Associates of Alaska, Inc.; Taylor Joint Venture; NERCO Oil & Gas, Inc.; Clements Energy, Inc.; Clements Production Company.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-771

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

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Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

**RESPONDENT PACIFIC POWER & LIGHT COMPANY'S
BRIEF IN OPPOSITION TO
ISSUANCE OF WRIT OF CERTIORARI**

REASONS FOR DENYING THE WRIT

A petitioner's disappointment is not a sufficient basis for issuance of a writ of certiorari; required are issues of substance, merit and importance which may lead to decisions of possible consequence. Here, however, Petitioner Clark-Cowlitz Joint Operating Agency ("CCJOA"), which consists of two substantial, operating Washington public utility districts that enjoy preference access to the vast federal Columbia River hydroelectric resources,¹ can raise no such important issues. This is primarily the result of passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), which clarified

¹Virtually *all* of the power consumed by CCJOA's retail customers comes from hydroelectric resources, while most of Respondent Pacific Power & Light Company's ("Pacific Power") generation comes from much more expensive thermal resources. As a consequence, CCJOA's retail electric rates are substantially lower than Pacific Power's.

the municipal-preference-on-relicensing issue by prohibiting such a preference. Passage of that legislation eliminated much of the significance of this controversy. As a result, instead of being able to claim that the judicial resolution of this controversy will have wide-ranging impacts, CCJOA's Petition merely mirrors disappointed expectations. CCJOA is disappointed because it has been prevented from usurping very valuable existing hydroelectric resources belonging to its competitor, Pacific Power, at *depreciated, original-cost* prices.² Once again, however, disappointment is not a sufficient basis for issuance of a writ of certiorari.

CCJOA advances three claims: (1) that the en banc opinion below erroneously failed to give res judicata effect to a prior Federal Energy Regulatory Commission ("FERC" or "Commission") interpretation of statute, *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) ¶ 61,337 (1980) ("*Bountiful*"); (2) that the FERC's decision renewing the existing license for the Merwin Project, *Pacific Power & Light Co.*, 25 F.E.R.C. (CCH) ¶ 61,052 (1983) ("*Merwin*"), erroneously determined that there is no preference in favor of municipalities such as CCJOA in relicensing proceedings; and (3) that, notwithstanding CCJOA's insistence of res judicata effect for *Bountiful*, this Court should ignore that portion of *Bountiful* that required consideration of relative economic impacts upon competing applicants. Not one of CCJOA's three arguments has any merit: The first is based upon the false notion that res judicata principles arise when pure questions of law are involved; the second overlooks both that *Bountiful's* conclusion was itself an aberration and that the judiciary should defer to an agency's interpretation of its own statute (even when that interpretation is inconsistent with a prior interpretation); and the third is nothing more than a plea that this Court withhold from Pacific Power the benefits of res judicata CCJOA attempts to claim for itself. CCJOA's Petition does not warrant serious consideration.

²This is most clearly evidenced by CCJOA's footnote 6, where it bemoans the fact that unless this Court takes action it will "be left empty-handed and minus the substantial monies it has expended" in the attempted usurpation. Nowhere does CCJOA even acknowledge that its takeover of Merwin Dam at depreciated original cost prices would inflict far higher penalties upon Pacific Power's retail customers than the benefits CCJOA's customers would gain from the acquisition.

I. RES JUDICATA PRINCIPLES ARE NOT APPLICABLE TO AN ADMINISTRATIVE DECISION ON "A PURELY LEGAL ISSUE, A QUESTION OF STATUTORY CONSTRUCTION WHICH IN NO WAY HINGES UPON THE FACTS OF A PARTICULAR CASE."

CCJOA first asserts that the opinion below, *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 826 F.2d 1074 (D.C. Cir. 1987), erroneously failed to give res judicata effect to *Bountiful*, thereby violating the rule of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) ("*Utah Construction*"). CCJOA Petition at 16. By its own terms, *Bountiful* involved solely the "resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case." *City of Bountiful*, No. EL78-43 (FERC May 3, 1979) (unpublished, quoted verbatim in CCJOA Petition at 6). In light of this procedural background, CCJOA's reliance upon *Utah Construction* is utterly misplaced, for *Utah Construction* held that res judicata principles arise only when the administrative agency makes determinations of fact in a trial-type setting:

When an administrative agency is acting in a *judicial capacity and resolves disputed issues of fact* properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 422 (emphasis added). As if to contrast the setting of *Utah Construction* from the present situation, this Court stated:

In [*Utah Construction*] the Board was acting in a *judicial capacity* when it considered the Pier Drilling and Shield Window claims, the *factual disputes* resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second *evidentiary* hearing on these matters already resolved as between these two parties.

Id. (emphasis added; footnote omitted). In contrast to *Utah Construction*, in *Bountiful* there were no witnesses, no testimony, no cross-

examination, no findings of fact, and no evidentiary record.³ For this reason alone, *Bountiful* simply cannot be given preclusive effect.⁴

Other courts have applied the principle that res judicata is limited to determinations of fact, as opposed to law. For example, Judge Friendly in *Associated Industries of New York State, Inc. v. United States Department of Labor*, 487 F.2d 342 (2d Cir. 1973), noted that principles of res judicata can be applied only to facts actually litigated. After citing and quoting *Utah Construction*, Judge Friendly concluded that it would be improper to impose res judicata in a situation in which no hearing had been held, and only an irrelevant fact had been litigated. 487 F.2d at 350 n.10. In a second decision from the Second Circuit, *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983), the panel in a *per curiam* decision held that a determination made in the absence of a trial-type hearing — testimony given under oath, subpoenaed evidence and cross-examination — could not be accorded res judicata effect. Finally, the Court of Appeals for the District of Columbia Circuit also has previously held that principles of preclusion should not be triggered when only abstract questions are involved. *Hollister Ranch Owners' Ass'n v. Federal Energy Regulatory Comm'n*, 759 F.2d 898 (D.C. Cir. 1985).

³The lack of any of the attributes of trial-type procedures points out the impropriety of the City of Bountiful's styling its initial pleading as a request for a "declaratory order." In fact, the absence of facts requires the conclusion that the City of Bountiful was in fact requesting issuance of an interpretative rule under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). See *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (interpretative rule is an "administrative construction of a statutory provision on a question of law reviewable in courts"). The City of Bountiful's error, however, is not significant; as this Court pointed out in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), the particular label an agency places upon its activity is not conclusive; "it is the substance of what the Commission has purported to do, and has done which is decisive."

⁴In footnote 9 at page 15 of its Petition, the CCJOA cites four decisions. None is on point; all involve preclusive effect accorded to prior determinations of fact, as opposed to law. For example, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), a state administrative tribunal's determination — that there was no factual basis for an allegation of discrimination — was held to preclude subsequent federal litigation. The factual nature of the decision is manifest; as this Court stated:

Certainly the administrative nature of the *factfinding* process is not dispositive. In [*Utah Construction*] we held that, so long as opposing parties had an adequate opportunity to litigate *disputed issues of fact*, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity."

Id. at 484 n.26 (emphasis added) (quoting *Utah Construction*, 384 U.S. at 422). And in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), this Court held that no preclusive effect was to be accorded to an agency determination of value of property.

The Restatement (Second) of Judgments confirms that res judicata is limited to an administrative agency's determinations of fact. Section 83 provides:

(1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata *only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:*

(a) Adequate notice to persons who are to be bound by the adjudication . . . ;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to *specified parties concerning a specific transaction, situation, or status, or a specific series thereof;*

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered

Restatement (Second) of Judgments § 83 (1982) (emphasis added).⁵ For the foregoing reasons, it is clear that *Bountiful* simply cannot be accorded any preclusive effect.

⁵The comments to the above-quoted section eliminate any possible doubt that res judicata effect should be withheld from "purely legal issues" considered in the absence of full, trial-type procedures. Comment b to Section 83 provides:

In performing legislative and managerial functions, agencies are not necessarily required to use procedures having the formality of adjudication. . . . While adjudicative procedure therefore is necessary to yield an adjudication that is binding under the rules of res judicata, not all proceedings involving elements of such procedure constitute adjudication. For example, the right to present evidence and to cross-

II. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WAS CORRECT IN AFFIRMING FERC'S DECISION THAT THERE IS NO MUNICIPAL PREFERENCE ON RELICENSING.

In 1986, Congress resolved the question of municipal preference on relicensing once and for all by passing the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). This legislation establishes clearly Congress's intent that preference not be accorded to municipalities such as CCJOA in relicensing situations. Therefore, the basic issue raised by CCJOA's Petition is the academic one of whether there was a municipal preference in relicensing matters prior to 1986. The better reasoning leads to a conclusion that, just as there is not now, there was not then such a preference.

Bountiful certainly was not the first time that the FERC or its predecessor, the Federal Power Commission ("FPC"), addressed the question of municipal preference on relicensing; in each of the two prior instances the determination was made that there is *no* such preference on relicensing. First, in 1968 the then-Chairman of the FPC informed Congress that, because there was no municipal preference on relicensing, Congress need not entertain legislation addressing that issue. *See Bountiful*, Appendix to Petition for Certiorari 329a, 360a-367a. Second, in 1976 an FPC Administrative Law Judge determined that there was no municipal preference on relicensing in a case involving an electric cooperative association. The ALJ's decision discussed the issue in depth, and concluded that both the statute on its face and the legislative history "make it abundantly clear that the preference provision does not apply in a competitive licensing proceeding against the original licensee." *Opinion No. 757; Opinion and Order Denying Eligibility for Municipal Preference*, 55 F.P.C. 1272, 1283 (1976) (ALJ Decision).⁶

(footnote continued)

examine witnesses is accorded in certain types of rule-making proceedings and licensing proceedings. . . . If such procedural rights of themselves indicated that a proceeding was adjudicative in nature, many types of rule-making hearings could be accorded res judicata effects. However, these procedural attributes are not of themselves sufficient to define adjudication.

Of course, there were absolutely no trial-type procedures in the *Bountiful* proceeding; therefore, the Restatement (Second) of Judgments clearly would withhold any preclusive effect from *Bountiful*.

⁶That decision was abandoned by the full commission because it was not necessary to the limited issue raised by the case, viz., whether rural electric cooperatives have preference on relicensing.

Judged in this historical perspective, it is *Bountiful*, and not *Merwin*, which is the aberration.

CCJOA's Petition urging this Court to overturn the FERC's determination that there is no municipal preference on relicensing conveniently overlooks the requirement that the judiciary give proper deference to agencies' interpretations of their own statutes. Indeed, this Court has sanctioned giving such deference even when that interpretation is inconsistent with a prior agency position. In *National Labor Relations Board v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978), this Court stated:

An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.⁷

In sum, while the legislative history behind the question of municipal preference on relicensing before passage of the Electric Consumers Protection Act of 1986 is admittedly not crystal clear, the better logic as well as law support the *Merwin* opinion. The Commission has wrestled with this issue on four occasions, and on three of those four occasions it has determined that there is no such preference. Of course, Congress very recently has concurred. *Merwin* is both the most recent examination of the issue, as well as the most exhaustive. Moreover, *Merwin* deserves special weight because, unlike *Bountiful*, it arose in a specific, concrete fact situation; indeed, the facts developed in the *Merwin* Project hearings obviously brought home the absurd results which could obtain if *Bountiful's* erroneous interpretation were allowed to survive. Therefore, because *Merwin* is a correct determination of law and because the opinion below correctly deferred to that interpretation, CCJOA's second allegation of error is not a sufficient basis for issuance of a writ of certiorari.

⁷Prominent lower federal courts concur; the Court of Appeals for the District of Columbia Circuit has on other occasions explicitly endorsed the notion that agencies should be allowed to change their interpretations of statutes: "[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding." *Chisholm v Federal Communications Comm'n*, 538 F.2d 349, 364 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); see also *Phoenix Hydro Corp. v. Federal Energy Regulatory Comm'n*, 775 F.2d 1187, 1191 (D.C. Cir. 1985) ("An agency is entitled to change its interpretation of a statute.").

III. CONSIDERATION OF RELATIVE ECONOMIC IMPACTS WAS MANDATED BY *BOUNTIFUL* AND SUBSEQUENTLY BY THE ELECTRIC CONSUMERS PROTECTION ACT OF 1986.

CCJOA's Petition first argues that *Bountiful* should be given preclusive effect. Then CCJOA urges this Court to ignore *Bountiful*'s requirement that relative economic impacts be considered in relicensing proceedings. CCJOA cannot have it both ways.

Bountiful held:

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as economic costs and benefits, the distribution of benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Bountiful, Appendix to Petition for Certiorari at 390a-391a. Pursuant to this directive, the parties to the *Merwin* hearings (including the FERC staff) developed in great detail the net economic harm which would result from transfer of the Merwin Project to CCJOA. For example, unrebutted testimony established that for every dollar of benefit to CCJOA's customers consequent to CCJOA takeover of the Merwin Project, Pacific Power's customers would lose from \$3 to over \$30, depending upon the circumstances and assumptions. Under no scenario was there anything even approaching a net economic benefit consequent to CCJOA transfer.⁸ In view of this unchallenged record, it is not surprising that CCJOA belatedly urges this Court to overrule *Bountiful*'s "economic impacts" test.⁹

⁸The predominant cause of the net negative consequences of transfer is CCJOA's much lower cost of power; because Pacific Power does not have preference access to the vast federal Columbia River hydroelectric resources, its alternative costs of power are much higher than CCJOA's. Thus, Pacific Power's loss of Merwin Dam causes a greater detriment to Pacific Power's customers than CCJOA's gain of Merwin Dam causes its own customers to benefit. See *Merwin*, Appendix to Petition for Certiorari at 151a-163-a.

⁹Of course, if the Merwin Project relicensing were subject to the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), it is clear that relative economic impacts upon the competing applicants would play a prominent role. This is because the requirement of an "economic impacts analysis" was folded into the "need for power" criterion of that act. See H.R. Rep. No. 934, 99th Cong., 132 Cong. Rec. H8776 (daily ed. Sept. 30, 1986); see also 132 Cong. Rec. H8951 (daily ed. Oct. 2, 1986) (remarks of Cong. Moorhead and Cong. Markey).

At best, CCJOA's request that this Court summarily reverse *Merwin* is an attempt to relitigate the "economic impacts" issue it lost in *Bountiful*. At worst, CCJOA's request is a damning admission that under no scenario can it demonstrate that the public interest supports CCJOA's takeover of the Merwin Project. Finally, it is indeed astonishing that CCJOA would so blithely abandon in the last part of its Petition the res judicata arguments it a few pages earlier so earnestly espoused.

CONCLUSION

CCJOA is simply disappointed that it has been prevented from usurping a very valuable hydroelectric generating resource at a very low price: depreciated original cost. Disappointment, however, is not sufficient to support issuance of a writ of certiorari. CCJOA has failed to raise any credible legal reason why the writ should issue. Accordingly, CCJOA's Petition should be denied.

Respectfully submitted,

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JOSEPH F. SPANIOL, JR.
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for the District of Columbia Circuit**

**RESPONDENT PUBLIC UTILITY COMMISSION
OF OREGON'S BRIEF IN OPPOSITION TO
ISSUANCE OF WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit en banc correctly refused to give *res judicata* effect to a prior Federal Energy Regulatory Commission ("FERC" or "Commission") decision¹ on a "purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case."²

2. Whether the Court of Appeals en banc was correct in holding that the municipal preference clause in section 7(a) of the Federal Power Act ("Act"), 16 U.S.C. § 800(a) (1982), does not apply in a relicensing proceeding in which the original licensee of the project is one of the applicants.

3. Whether FERC, in determining the "public interest" under section 7(a) of the Act, 16 U.S.C. § 800(a) (1982), for purposes of issuing a federal license to operate a hydroelectric power project in a relicensing proceeding in which the original licensee of the project is one of the applicants, may take into account the relative economic impacts and consequences of granting the license to one or the other of the competing applicants.

¹ *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) § 61,337 (1980) ("*Bountiful*").

² *City of Bountiful, Utah*, Docket No. EL 78-43 (FERC May 3, 1979) (unpublished) (order granting interventions and setting briefing schedule), quoted verbatim in the Petition for Writ of Certiorari at 6.

PARTIES TO THE PROCEEDINGS BELOW

Respondent Public Utility Commission of the State of Oregon (Oregon) intervened in the proceedings before the Federal Energy Regulatory Commission and the United States Court of Appeals for the District of Columbia, to represent and protect the interests of the state's residents, businesses and industries. *See* Or. Rev. Stat. § 756.040. Pacific Power and Light Company (PP&L), which is the owner and incumbent licensee of the Merwin Hydroelectric Project and one of the two competing applicants for the new license for the Project, serves 400,000 customers in Oregon, including 76,000 commercial and industrial customers. The Merwin Project was paid for in large part by inclusion of depreciation charges and a return on investment in the customers' electricity rates. Thus, the Oregon citizens who are served by PP&L have a substantial interest in whether PP&L retains the Merwin Project as part of its power supply system because, if the utility loses its license to the project, the ratepayers will lose the benefits of the low-cost electricity produced by that plant.

A list of the parties in the Court of Appeals appears at page ii of the Petition for a Writ of Certiorari filed by the Clark-Cowlitz Joint Operating Agency.

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REASONS FOR DENYING THE WRIT

The Clark-Cowlitz Joint Operating Agency (CCJOA), in its petition for a writ of certiorari, presents three claims:

(1) that the United States Court of Appeals for the District of Columbia Circuit en banc opinion erroneously failed to give *res judicata* effect to FERC's interpretation of provisions of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* (1982), in *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) § 61,337 (1980) ("*Bountiful*");

(2) that the Court of Appeals en banc erroneously held that the municipal preference clause in section 7(a) of the Act, 16 U.S.C. § 800(a) (1982), did not apply in a relicensing proceeding in which one of the applicants is the original licensee of the project; and

(3) that FERC, in determining the "public interest" in a relicensing proceeding under section 7(a) of the Act, 16 U.S.C. § 800(a), may not take into account the relative economic impacts and consequences of a licensing decision on each of the competing applicants and on the respective segments of the public served by each of the applicants.

None of CCJOA's claims merits a grant of certiorari. Respondent Pacific Power and Light Company (PP&L) has filed arguments in opposition to CCJOA's petition for a writ of certiorari. Oregon joins in the substantive points advanced by PP&L. As PP&L argues, CCJOA's first and third claims are inconsistent. That is, CCJOA first contends that FERC's interpretation in *Bountiful* of the municipal preference clause (16 U.S.C. § 800(a)) should have been given preclusive effect. However, notwithstanding this contention of *res judicata* effect for *Bountiful*, CCJOA's third claim asks this Court to ignore FERC's holding in *Bountiful* that relative economic impacts should be considered in hydro-

electric project relicensing proceedings.³ CCJOA cannot have it both ways.

Furthermore, the municipal preference question raised in CCJOA's second claim of error was addressed by Congress in the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). This legislation clarified the matter by prohibiting a municipal preference in relicensing proceedings.⁴ Passage of this legislation has greatly reduced the significance of this issue.

CCJOA's petition for a writ of certiorari presents no issue of importance beyond the resolution of this case. This case does not present the kind of special and important legal questions that merit a grant of certiorari. The Court of Appeals' en banc opinion does not conflict with decisions of this Court or of other circuits. Moreover, CCJOA's claims are inconsistent and without merit.

CONCLUSION

For the foregoing reasons, the Clark-Cowlitz Joint Operat-

³ The pertinent portion of *Bountiful* is reprinted in Appendix to the Petition for Writ of Certiorari, at 389a-92a. Additional support for FERC's determination in *Bountiful* that economic impacts can be considered as a factor bearing on the public interest is found in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 756-58 (1973); *Udall v. FPC*, 387 U.S. 428, 448-50 (1967); *Chapman v. Federal Power Comm'n*, 345 U.S. 153, 171 (1953) (commission has broad discretion to consider, *inter alia*, "economic issues" in licensing proceedings); *Scenic Hudson Preservation Conf. v. Federal Power Com'n*, 354 F.2d 608, 615, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (commission "has an affirmative duty to inquire into and consider all relevant facts," including economic interests).

⁴ As CCJOA noted in its Petition for a Writ of Certiorari, at 13, this legislation "provided that the [present case] continues to be governed by the existing statute. Electric Consumers Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 2, 11, 100 Stat. 1243, 1245 (1986)."

ing Agency's petition for a writ of certiorari should be denied.

Respectfully submitted,

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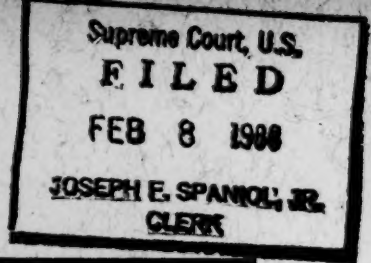
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(6)
No. 87-771



In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY, PETITIONER

. v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL ENERGY
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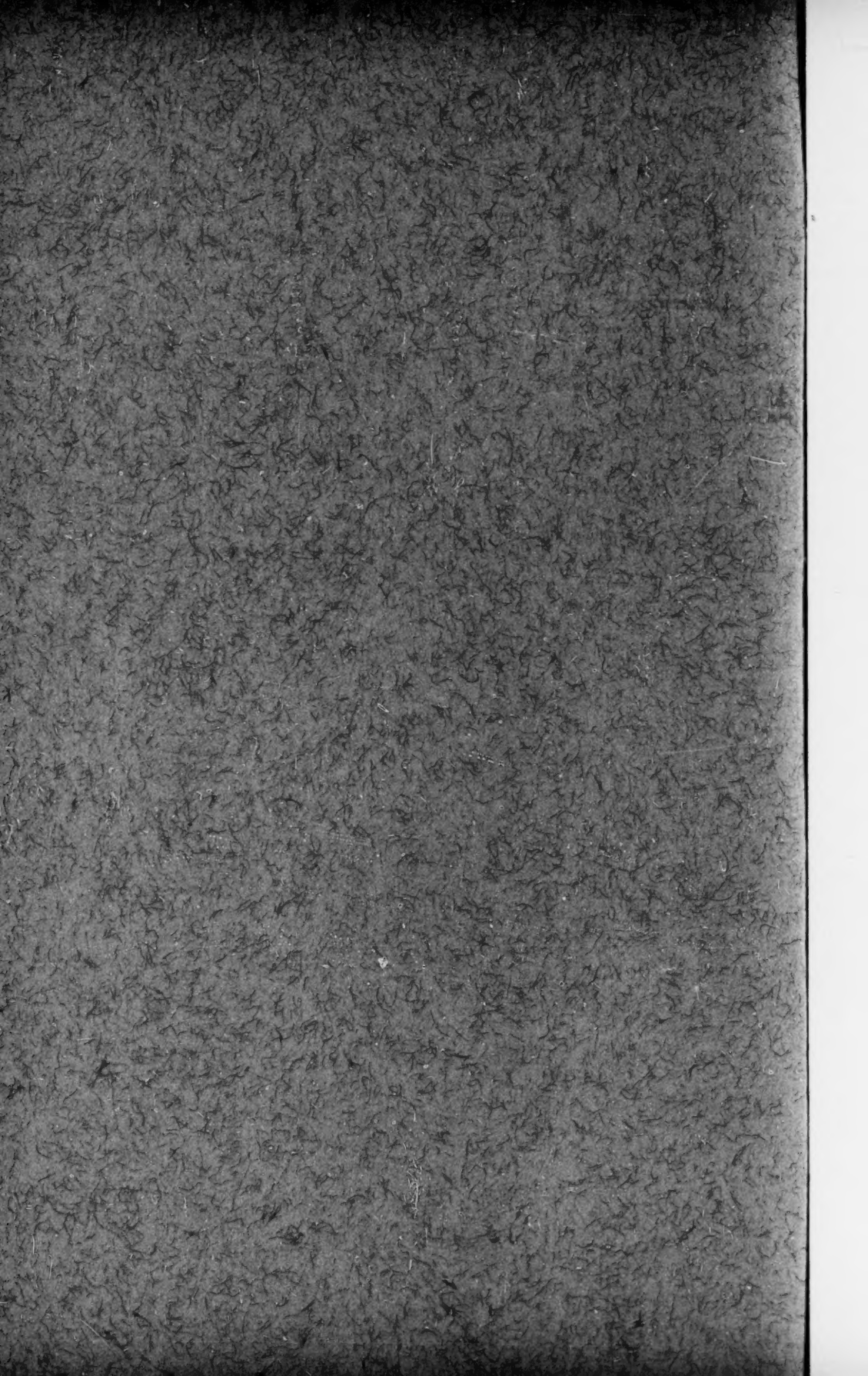
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QUESTIONS PRESENTED

1. Whether the doctrine of issue preclusion required the Federal Energy Regulatory Commission to adhere to the interpretation of a statute it adopted in a declaratory proceeding to which petitioner was a party, even though the former interpretation was upheld on judicial review solely on the ground that it was a reasonable construction of the statute and the Commission subsequently concluded that the former interpretation of the statute was erroneous.

2. Whether, prior to its amendment in 1986, Section 7(a) of the Federal Power Act, 16 U.S.C. 800(a), granted a municipality a preference as against the original licensee in a proceeding to relicense an existing hydroelectric power project.

3. Whether, in a proceeding to relicense a hydroelectric power project, the Commission may consider the economic impact upon consumers of transferring the license from the original licensee to a new licensee.

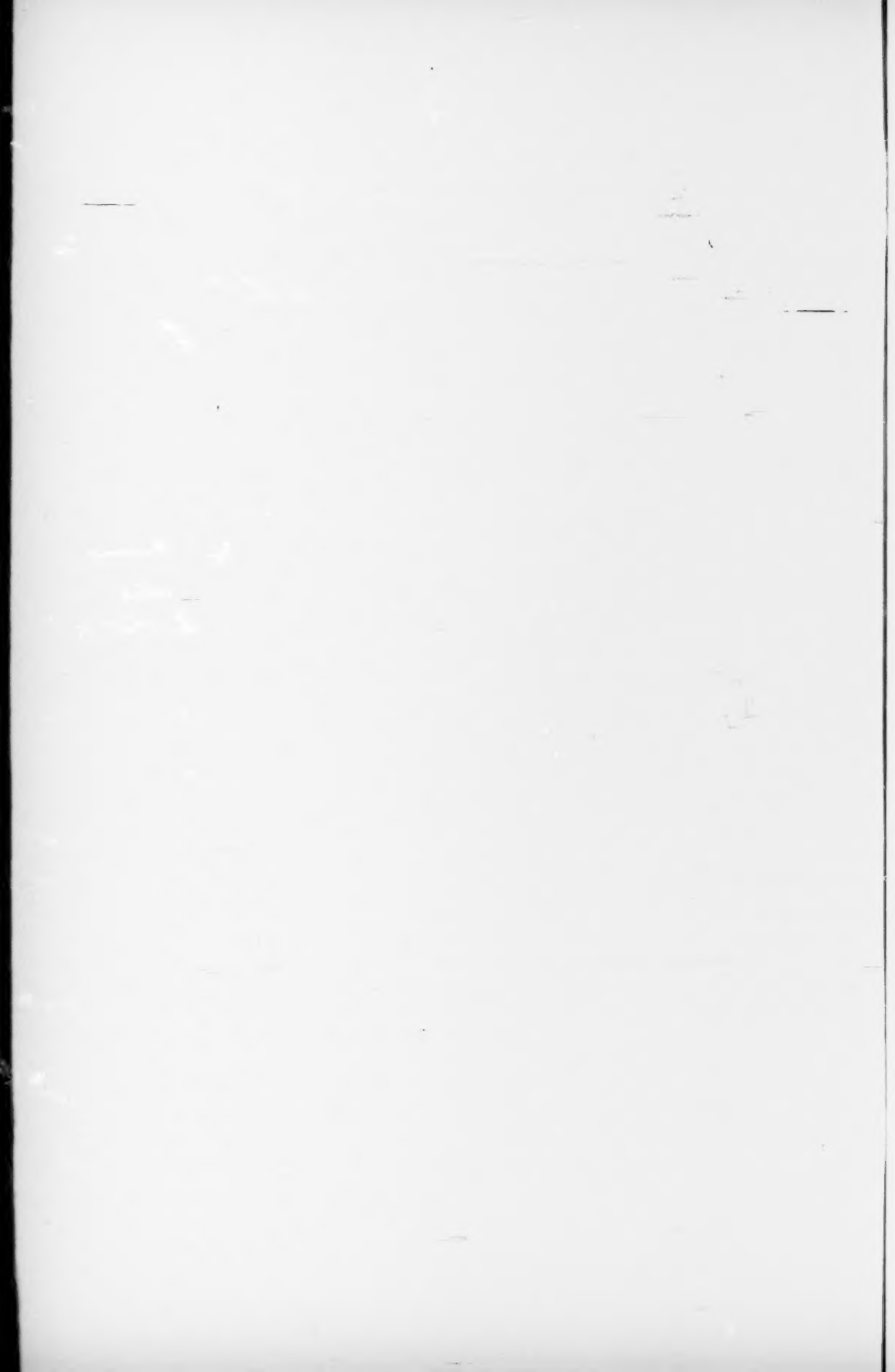


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In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-56a) is reported at 826 F.2d 1074. The opinion of the court of appeals panel (Pet. App. 57a-92a) is reported at 775 F.2d 366. The opinion of the Federal Energy Regulatory Commission (Pet. App. 95a-198a) is reported at 25 F.E.R.C. (CCH) ¶ 61,052. The Commission's order denying rehearing (Pet. App. 93a-94a) is reported at 25 F.E.R.C. (CCH) ¶ 61,290. The initial decision of the administrative law judge (Pet. App. 199a-309a) is reported at 23 F.E.R.C. (CCH) ¶ 63,037.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1987. The petition for a writ of certiorari was filed on November 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *The Bountiful Dam Declaratory Proceeding*

The Federal Power Act, 16 U.S.C. (& Supp. IV) 791a *et seq.*, authorizes the Federal Energy Regulatory Commission to grant licenses to public and private entities for the development of hydroelectric power projects. A license may be granted for a term of up to 50 years; upon the expiration of the license, the United States may recover the project for its own use, the Commission may issue a new license to the original licensee, or the Commission may issue a new license to a new licensee. 16 U.S.C. (& Supp. IV) 799, 807-808.¹ Prior to its amendment in 1986, Section 7(a) of the Act, 16 U.S.C. 800(a), provided in pertinent part that:

[i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under [the statutory provision relating to relicensing] the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources of the region * * *.

A number of the hydroelectric power licenses awarded in the 1920s were due to expire in the 1970s. In 1978, the cities of Bountiful, Utah, and Santa Clara, California, filed petitions for "declaratory orders" requesting a determination by the Commission as to whether Section 7(a) provided a preference for a municipality as against the "original licensee" in a proceeding to relicense an existing

¹ Compensation must be paid to the original licensee in the event the project is taken over by the United States or the license is awarded to a new licensee. 16 U.S.C. (& Supp. IV) 807(a), 808(a).

hydroelectric power project (C.A. App. 1).² On September 27, 1978, the Commission issued a "Notice of Petitions for Declaratory Orders and Notice of Consolidation," which consolidated the Santa Clara and Bountiful petitions on the ground that they presented "similar or perhaps the same questions of law."³ Thereafter, on May 3, 1979, the Commission issued an order granting several motions to intervene in the consolidated proceeding (*id.* at 1-4).⁴

² Under Section 15 of the Federal Power Act, 16 U.S.C. (& Supp. IV) 808, the "original licensee" is the party to whom the Commission awarded the license when the project was initially licensed or any successor standing in the shoes of that licensee during the term of the original license (see Pet. App. 371a-372a & n.40).

³ The unpublished notice is reproduced in Appendix B to the Commission's supplemental brief on rehearing in the court of appeals.

⁴ Both Pacific Power & Light Company (PP&L) and petitioner intervened in the *Bountiful* proceeding. The Commission denied a motion filed by PP&L, whose original license for the Merwin Dam hydroelectric project had expired, to postpone the declaratory proceeding until the conclusion of the evidentiary hearing on the competing applications for a new license for the Merwin Dam project. Those competing applications, which are the subject of the present case (see pages 6-10, *infra*), had been filed by PP&L and by petitioner, an entity that qualifies as a municipality under the Act (see 16 U.S.C. 796(7)). In so ruling, the Commission stated (C.A. App. 2 (footnote omitted)):

In this docket, we are faced with resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case. * * *.

* * * Even if we should decide here that the section 7(a) preference does apply against an "original licensee" in relicensing proceedings, that determination would not foreclose either [petitioner] or PP&L from addressing in the proceeding for relicensing of the Merwin Project the particular circumstances of [petitioner], PP&L, and the Merwin Project and whether [petitioner] would be entitled to such a preference. Those are matters which

On June 27, 1980, the Commission issued its declaratory order in *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337, reh'g denied, 12 F.E.R.C. (CCH) ¶ 61,179 (1980), aff'd *sub nom. Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), cert. denied, 463 U.S. 1230 (1983).⁵ The Commission ruled that Section 7(a) grants a preference to a municipal applicant in a relicensing proceeding, even as against the original licensee. Thus, if plans of the municipality are "equally well adapted," or could be made equal to, the plans of any other applicant, including the original licensee, the Commission would be required to issue the license to the municipality. Pet. App. 339a, 389a.

The Commission further stated that absent a record it could not specifically delineate the factors it would take into account in determining whether applicants' plans are "equally well adapted" within the meaning of Section 7(a) (Pet. App. 389a). The Commission did, however, provide "some generalizations about the public interest determination" under Section 7(a). Pet. App. 389a; see *id.* at 389a-393a. It stated that "Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense," but that the statute instead required consideration of the

may well involve material factual disputes between [petitioner] and PP&L and which, in any event, would not aid our determination of the issue of law before us in this docket. * * * [A]ssuming for the sake of argument that we decide the section 7(a) preference applies in relicensing cases—[petitioner] and PP&L may litigate in the relicensing proceeding on the Merwin Project the separate, specific question of whether [petitioner] is entitled to such a preference.

⁵ The decisions of the Commission (Pet. App. 329-393a, 327a-328a) and the court of appeals (*id.* at 314a-326a) are reprinted in the appendix to the petition for a writ of certiorari in this case.

"broader social impacts [of relicensing] such as economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts" (*id.* at 389a, 390a-391a (footnote omitted)). Accordingly, the Commission directed Bountiful and other municipalities competing with original licensees in relicensing proceedings to develop records in individual cases from which the Commission would be able to determine which applicant's plans were "best adapted" to serve the public interest (*id.* at 392a).

The United States Court of Appeals for the Eleventh Circuit affirmed the Commission's determination (Pet. App. 314a-326a). The court said, "[w]e have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation" (*id.* at 325a). Applying the principle that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,' " the court upheld the Commission's interpretation of Section 7(a) (Pet. App. 326a (citation omitted)).

In response to certiorari petitions filed by the private parties challenging the court of appeals' ruling on the municipal preference issue, the Solicitor General, at the Commission's request, filed a brief stating that a majority of the members of the Commission appeared ready to overrule the *Bountiful* decision and adopt the contrary interpretation of the statute, under which a municipality would have no preference as against an original licensee. The Solicitor General therefore urged the Court to grant the petitions, vacate the judgment of the court of appeals, and remand the case to the Eleventh Circuit for further

proceedings. FERC Br. at 8-9, *Utah Power & Light Co. v. FERC*, 463 U.S. 1230 (1983). On July 6, 1983, this Court denied the petitions for certiorari.

2. *The Merwin Dam Relicensing Proceeding*

a. The present case concerns the assignment of the license to operate the Merwin Dam hydroelectric project, located in the State of Washington. The original license for that project was granted in 1929 for a term of 50 years; the license was transferred to Pacific Power & Light Co. (PP&L) in 1941. Pet. App. 5a. As the successor to the original licensee, PP&L qualifies as the original licensee (see *id.* at 108a-109a, 371a-372a & n.40). PP&L filed an application for a new license in 1976. Petitioner, an entity formed by public utility districts surrounding the project, filed a competing application in 1977. Petitioner qualified as a municipality within the meaning of the statute (see 16 U.S.C. 796(7)), and asserted that it was entitled to the benefit of the Section 7(a) preference for municipalities. Both PP&L and petitioner participated as intervenors in the *Bountiful* proceeding. Pet. App. 5a.

Following an evidentiary hearing, the administrative law judge (ALJ), issued a decision granting the license to petitioner (Pet. App. 199a-309a). The ALJ found that petitioner's plans and the plans put forward by PP&L were "equally well adapted" to serving the public interest; under the Commission's decision in *Bountiful*, the ALJ concluded that petitioner was therefore entitled to the new license (*id.* at 283a).

The Commission unanimously reversed the ALJ's determination (Pet. App. 95a-198a). A majority of the Commission determined that the earlier decision in *Bountiful* regarding the effect of the municipal preference in re-

licensing proceedings where the original licensee is one of the applicants was erroneous “and should be overruled” on the ground that it was inconsistent with the statutory language, legislative history, and overall purpose of the statute (*id.* at 102a). The Commission concluded that the municipal preference is not applicable in relicensing proceedings as against the original licensee but is applicable only in a relicensing proceeding in which the original licensee does not seek to renew its license (*id.* at 102a-142a).⁶

The Commission unanimously concluded that PP&L was entitled to the license because its application was the best adapted “to conserve and utilize in the public interest the water resources of the region” within the meaning of Section 7(a) (see Pet. App. 124a-140a).⁷ In the Commission’s view, the proper focus of the “public interest [inquiry under Section 7(a)] is the impact on consumers of choosing between an ‘original licensee’ in possession of project works, and a ‘new licensee’ ” (Pet. App. 149a). In light of the economic and other impacts on consumers in-

⁶ Two commissioners dissented from this portion of the decision (Pet. App. 194a-198a).

⁷ Those commissioners who voted to overrule *Bountiful* applied the alternative standard set forth in Section 7(a): “as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicants to carry out such plans.” Those commissioners who dissented from the decision to overrule *Bountiful* nevertheless agreed that the municipal preference would not apply unless the applications filed by the original licensee and the municipality were “equally well adapted to conserve and utilize in the public interest the water resources of the region” within the meaning of Section 7(a). Since the dissenters agreed that PP&L’s application was superior to petitioner’s, they, too, saw no occasion to apply the preference. Pet. App. 194a-198a.

volved in this case, the Commission held that petitioner's plans were not "equally well adapted" as those of PP&L and that the public interest therefore favored issuing the license to PP&L (*id.* at 149a-167a).

b. Petitioner sought review of the Commission's determination in the United States Court of Appeals for the District of Columbia Circuit (see 16 U.S.C. 825l(b)). A panel of the court of appeals reversed the Commission's determination (Pet. App. 57a-92a); and the full court of appeals granted rehearing en banc. While the case was pending before the en banc court, Congress amended Section 7(a) to eliminate the municipal preference in all relicensing proceedings except the present one. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, §§ 2, 11, 100 Stat. 1243, 1255.

The full court of appeals, by a divided vote, upheld the Commission's decision in part and vacated the decision in part (Pet. App. 1a-56a). The court first rejected petitioner's contention that principles of res judicata or collateral estoppel required the Commission to adhere to the interpretation of Section 7(a) adopted in the *Bountiful* declaratory order proceeding. The court observed that "[a] fundamental requisite of issue preclusion is an identity of the issue decided in the earlier action and that sought to be precluded in a later action" (Pet. App. 10a). It found that "the Eleventh Circuit neither addressed nor had the opportunity to address the specific issue (or claim) before us, namely the propriety of FERC's *present*, anti-*Bountiful* view that the municipal preference does *not* obtain in relicensings to which the incumbent licensee is a party. The Eleventh Circuit was, instead, called upon to assess the reasonableness of FERC's view enunciated in the short-lived *Bountiful* decision, namely that the preference applied in all relicensings. Its decision that *Bountiful* was

both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC's recent interpretation is also reasonable and in accordance with the statute" (*id.* at 11a (emphasis in original; citation and footnote omitted)).

The court also found preclusion inappropriate because both the Commission and petitioner argued in the *Bountiful* case that the municipal preference applied to all relicensings. The court stated that issue preclusion "attaches only to such issues as the parties litigated adversely to each other in the prior litigation" (Pet. App. 12a).⁸

Turning to the merits of the Commission's conclusion that the municipal preference does not apply in relicensing proceedings in which the original licensee seeks to renew its license, the court upheld the Commission's interpretation as "a reasonable reading of the statute" (Pet. App. 28a). The court agreed with the Commission that Section 15 of the Federal Power Act, 16 U.S.C. (& Supp. IV) 808, the statutory provision concerning relicensing proceedings, distinguishes between the issuance of a new license to the original licensee and the issuance of a new license to a new licensee. The Commission had concluded that, because the Section 7(a) preference applies only "in issuing licenses to new licensees under" Section 15, the preference did not apply in proceedings in which the original licensee sought a new license. The court found that this construction of the statute best comports with the statutory language and that the legislative history provides no support for a contrary interpretation. Pet. App. 28a-32a.

⁸ Applying the test set forth in *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), the court also concluded that principles of retroactivity did not bar the Commission from applying its new interpretation of Section 7(a) in the present proceeding (Pet. App. 14a-24a).

Finally, the court reviewed the Commission's assessment of the competing applications in this case. It first found that the Commission correctly concluded that it could consider the relative economic impact of an award of the license to one applicant or another (Pet. App. 33a-35a). It concluded, however, that the Commission's analysis of these economic impacts was insufficient and directed the Commission to provide a more complete explanation of its conclusion that, because PP&L would have to bear a higher cost if it was forced to obtain alternative sources of energy, the license should be awarded to PP&L (*id.* at 35a-38a).

Judge Mikva, joined by Judges Robinson and Edwards, dissented. They concluded that the Commission was required to adhere to the *Bountiful* ruling in this proceeding and that the Commission's new interpretation of Section 7(a) could not be sustained. Pet. App. 39a-56a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question that underlies this controversy—the scope of the Section 7(a) municipal preference—is of no continuing importance because Congress has amended the statute to eliminate the municipal preference in relicensing proceedings. Although Congress allowed the present proceeding to continue under the former version of the statute, the court of appeals' resolution of the matter will have no effect beyond determining the controversy between these particular parties. We also note that this case is in an interlocutory posture: the court of appeals remanded the matter to the Commission for further explanation of the Commission's decision (see Pet. App. 38a). For all of these reasons, review by this Court is not warranted.

1. a. Petitioner first contends (Pet. 15-20) that principles of issue preclusion required the Commission to adhere to the interpretation of Section 7(a) adopted in the *Bountiful* declaratory order proceeding.

The doctrine of collateral estoppel, or issue preclusion, holds that “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Restatement (Second) of Judgments § 27 (1982); see also *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The court of appeals correctly concluded that the doctrine is inapplicable here.

First, it is well settled that collateral estoppel applies only when the issue to be litigated in the second proceeding is identical to the issue that was determined in the prior proceeding. See *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. United States*, 439 U.S. at 327-328; *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). The court of appeals ruled correctly that the issue in the present proceeding is *not* identical to the issue determined by the Eleventh Circuit. All that the Eleventh Circuit held in the prior litigation regarding the scope of the Section 7(a) preference was that the Commission’s conclusion that the preference applied in relicensing proceedings as against the original licensee should be upheld as a matter of deference to the Commission. See Pet. App. 325a-326a (citation omitted) (“[w]e have reviewed the Commission’s interpretation of this statute and deem such construction consistent with the statute’s language, structure, scheme, and available legislative history. We must give great deference to the Commission’s

statutory interpretation. The Supreme Court has announced the rule that “the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong” ’ ’).

The question in the present case, by contrast, is whether the Commission’s new interpretation of Section 7(a) is also entitled to such deference. That question is plainly different from the issue determined by the Eleventh Circuit. The latter court’s “decision that [the Commission’s interpretation of Section 7(a)] in *Bountiful* was both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC’s recent interpretation is also reasonable and in accordance with the statute” (Pet. App. 11a (footnote omitted)).

Petitioner asserts (Pet. 20) that these two issues are simply different sides of the same coin because “the positive of an issue is the same as the negative of an issue.” But the court of appeals correctly observed that “an ambiguous or broadly worded statute may admit of more than one interpretation that is reasonable and consistent with Congressional intent” (Pet. App. 11a-12a). The conclusion that one interpretation of a statute is reasonable thus does not necessarily foreclose the conclusion that a contrary interpretation of the statute is also reasonable. See *Pattern Makers’ League v. NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring); *Bankamerica Corp. v. United States*, 462 U.S. 122, 149 (1983) (footnote omitted) (White, J., dissenting) (“[a]gencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. [The Supreme Court] and other courts have approved such administrative ‘changes in course,’ as long as the new interpretation is consistent with congressional intent.”). Indeed, any other result would conflict with the basic rule that when “faced with new develop-

ments or in light of reconsideration of the relevant facts and its mandate, [an agency] may alter its past interpretation and overturn past administrative rulings and practice.” *American Trucking Ass’ns v. Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967); accord *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863 (1984) (“[a]n initial agency interpretation [of its underlying statute] is not instantly carved in stone”).⁹

Petitioner and amicus American Public Power Association (APPA) assert that even if the Eleventh Circuit’s decision has no preclusive effect the Commission is precluded by its *own* decision in *Bountiful* from revisiting the original licensee issue as it affects entities that participated

⁹ Petitioner attacks the court of appeals’ conclusion (Pet. App. 13a n.5) that issue preclusion need not be applied if it would result in inequitable administration of the law. Pet. 17-19; see also American Public Power Ass’n Br. 2-3 n.1. As a threshold matter, the court’s observation is relevant only in the event that preclusion is found to be otherwise appropriate because the issues in the two cases are identical. Moreover, there is nothing unprecedented about the court’s statement. See Restatement (Second) of Judgments § 28(2)(b) (1982) (preclusion is not appropriate if the issue is one of law and “a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws”). The comments to the Restatement state that “it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law” (*id.* § 28 comment c). Since the amendment of Section 7(a) eliminated any preclusive effect that the *Bountiful* decision might have in any other licensing proceeding, the court reasonably concluded that, assuming arguendo that preclusion would otherwise be available, it would be inequitable to deprive the parties in this proceeding of a determination on the merits by the Commission. See Pet. App. 13a-14a n.5.

in that proceeding. But an agency is not precluded from revising its position on a pure question of statutory interpretation, reached in a proceeding that functionally resembled a rulemaking, and applying the revised interpretation to persons who participated in the earlier proceeding.¹⁰ Although the *Bountiful* proceeding was styled an adjudication (see 5 U.S.C. 554(e)) and was conducted pursuant to the Administrative Procedure Act requirements applicable to adjudications, the proceeding in fact resembled a rulemaking. The Commission permitted intervention by a large number of parties (see Pet. App. 336a-337a) and reached a determination regarding a general question of statutory interpretation. See pages 3-4 note 4, *supra*.

In view of the strong policy in favor of allowing administrative agencies to exercise discretion in enforcing the statutes they are charged with administering, application of preclusion principles simply is not proper in a rulemaking setting. That is, an entity is not entitled, by virtue of having participated in a rulemaking, to invoke the preclu-

¹⁰ Petitioner's reliance (Pet. 15-16) on *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), is misplaced. There, the Court, in dicta, rejected as "too broad" language in earlier opinions suggesting that preclusion principles are wholly inapplicable in administrative proceedings (384 U.S. at 422). The Court stated that the preclusion doctrine can be invoked to enforce repose between parties to an administrative proceeding when the administrative agency acts in a "judicial capacity" to resolve "disputed issues of fact" (*id.* at 421-422). In *Bountiful*, the Commission was acting only partially in a "judicial capacity" and did not resolve any "issue of fact." Similarly, the Court's approval of the application of the doctrine of collateral estoppel against the United States in *United States v. Mendoza*, *supra*, in the context of successive *judicial* proceedings says nothing about whether the doctrine binds an agency in successive *administrative* proceedings of the type presented here.

sion doctrine to insulate itself against the effect of subsequent amendment of the rule. The application of the preclusion doctrine here would have the same untoward effect of limiting an agency's flexibility in carrying out its statutory mandate by forcing the agency to adhere to a general determination of law that the agency now believes to have been erroneous. Cf. Restatement (Second) of Judgments §§ 28 comment c, 29 comment i, 83 comment h (1982) (recognizing exceptions to general rules of issue preclusion with respect to determinations of pure questions of law by an administrative agency charged with enforcing a particular statute); *Second Taxing Dist. v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982); *FTC v. Texaco, Inc.*, 555 F.2d 862, 893-894 (D.C. Cir.) (en banc) (Leventhal, J., concurring), cert. denied, 431 U.S. 974 (1977); *Chern v. Bank of America*, 15 Cal. 3d 866, 871, 544 P.2d 1310, 1313, 127 Cal. Rptr. 110, 113 (1976); see also 2 K. Davis, *Administrative Law Treatise* § 18.08, at 597 (1958); see also *United States v. Moser*, 266 U.S. 236 (1924).

That conclusion does not leave an administrative body free to change its mind with impunity. The principles governing retroactive application of a legal rule provide ample protection for the rights of affected parties. See generally *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Here, following a complete analysis of the question, the court of appeals found that retroactive application of the Commission's new interpretation of the statute was permissible (see Pet. App. 14a-25a); petitioner has not sought review of that determination.

Finally, "[i]ssue preclusion * * * attaches only to such issues as the parties litigated adversely to each other in the prior litigation." *Jack Faucett Associates v. AT&T*, 744 F.2d 118 (D.C. Cir. 1984), cert. denied, 469 U.S. 1196

(1985); see also Restatement (Second) of Judgments § 38 (1982). Because the Commission and petitioner were on the same side in the *Bountiful* proceeding, petitioner cannot invoke the preclusion doctrine against the Commission here. For all of these reasons, the court of appeals correctly concluded that the Commission was not precluded from adopting its new construction of the statute.

b. The issue here is not, as petitioner and the APPA suggest, whether the doctrine of repose has any application to agency decisions. It is whether an agency, having adopted one interpretation of a statute in a broad rulemaking-type proceeding (albeit one styled as an adjudication), and having later decided that that interpretation was wrong, may apply what it now regards as the better interpretation to entities that participated in the earlier proceeding. That question has apparently not previously arisen, and it is not the subject of any conflict in the courts of appeals. It does not warrant review in a case where the underlying statutory question has been resolved for future cases by congressional action and where there is substantial reason to doubt that petitioner would ultimately prevail on either interpretation of the statute (see page 7 & note 7, *supra*).¹¹

¹¹ In addition, the present case does not provide a proper factual setting for consideration by this Court of the question whether issue preclusion may be asserted against a government agency on the basis of an administrative proceeding such as the *Bountiful* proceeding. One important factor in determining whether preclusion principles may be applied in connection with rulemaking-type proceedings is the fact that, if preclusion were permitted, a large number of parties would be able to invoke those principles against an administrative agency, requiring the agency to adhere to prior legal determinations and thus depriving the agency of any flexibility in fulfilling its statutory mandate. That important practical consequence is materially distorted in the present case because the intervening congressional

2. Petitioner next asserts (Pet. 20-23) that the Commission's new interpretation of Section 7(a) cannot be sustained. We note as a threshold matter that this question of statutory construction has no continuing importance. While this case was pending before the court of appeals, Congress amended Section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensing proceedings except the proceeding in the present case. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, §§ 2, 11, 100 Stat. 1243, 1255. Because the resolution of this issue will therefore affect only the dispute between the parties to this case, review by this Court is plainly unwarranted.

In any event, the court below correctly concluded that the Commission's construction of Section 7(a) is reasonable. In the first place, the language of the relevant statutory provisions supports the Commission's construction. The portion of Section 7(a) (emphasis added) that is relevant here provides that "in issuing licenses to *new licensees* under [Section 15] the Commission shall give preference to applications * * * by States and municipalities." Section 15(a), 16 U.S.C. (& Supp. IV) 808(a), in turn distinguishes between a "new licensee" and an "original licensee." The section gives the Commission two separate options: to "issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations" or to "issue a new license under said terms and conditions to a new licensee." The better reading of

action has eliminated any possibility that preclusion principles will be invoked by other parties in other proceedings. The facts of this case thus mask the potentially far-reaching effects of the rule of preclusion advocated by petitioner, and the Court therefore should not address that issue in this case.

this language, plainly, is that the municipal preference referred to in Section 7(a) applies only to the second alternative available under Section 15, *i.e.*, the issuance of a new license to a "new licensee"; the preference is not triggered when a new license is issued to the "original licensee." As the court below found (Pet. App. 29a (emphasis in original)), the Commission's reading of these provisions "has the substantial virtue of giving meaning to *all* of the words of the statute and depending *only* on the words that Congress employed in drafting it." Moreover, unlike the construction of the Act urged by petitioner, this approach gives the phrase "issuing [a] license[] to [a] new licensee[]" in Section 7 of the Act the same meaning as that phrase has in Section 15. See Pet. App. 30a-31a.

The court of appeals acknowledged that "the merit of FERC's present interpretation is not entirely free from doubt" because the words "between other applicants" in the second clause of Section 7(a) offer some support for petitioner's view (Pet. App. 30a). But in any event, the court said, "a court cannot substitute what it considers the 'more natural' construction of an ambiguous statute for a reasonable interpretation advanced by an agency. Since it is beyond cavil that section 7(a) is reasonably susceptible to the interpretation proffered by FERC, we are duty bound to uphold it." Pet. App. 31a (citations omitted).¹²

¹² The court found the legislative history ambiguous with respect to the scope of Section 7(a) (see Pet. App. 31a-32a). The court of appeals also found that the Commission's interpretation of the statute reasonably accommodates "the public and private interests taken into account by the Act" (*id.* at 33a).

Contrary to petitioner's claim (Pet. 21-22), the Eleventh Circuit's decision upholding the Commission's prior construction of the statute does not discredit the decision below. Both courts found the statutory language and legislative history inconclusive and deferred to the administrative interpretation of the statute.

3. Petitioner also challenges (Pet. 23-24) the unanimous conclusion of the Commission (Pet. App 141a-149a), upheld by the court below (*id.* at 33a-35a), that the Commission in a relicensing proceeding may consider the economic impact on consumers of transferring a license from an original licensee to a new licensee. In the absence of a conflict among the courts of appeals with respect to this issue—and petitioner does not assert the existence of a conflict—there is no reason for review by this Court.¹³

Section 7(a) provides that the Commission must evaluate competing applications for hydroelectric power facility licenses by determining which plan is “best adapted to develop, conserve, and utilize in the public interest the water resources of the region.” It is well-settled that the term “public interest” in a regulatory statute draws its meaning from the substantive provisions and purposes of the underlying statute. *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

The public interest inquiry under other provisions of the Act is quite broad. Thus, in determining the terms to be included in a hydroelectric power license, Section 10(a) of the Act, 16 U.S.C. 803(a), permits the Commission to base its decision upon “an exploration of all issues relevant to the ‘public interest,’ including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife.”

¹³ Moreover, this issue has no further importance with respect to relicensing proceedings because Congress has now made clear that the Commission must consider economic impacts in such proceedings. See Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, § 4, 100 Stat. 1245.

Udall v. FPC, 387 U.S. 428, 450 (1967); see also *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 757-758 (1973); accord *Municipal Electric Ass'n v. FPC*, 414 F.2d 1206 (D.C. Cir. 1969); *Citizens for Allegan County v. FPC*, 414 F.2d 1125, 1130 (D.C. Cir. 1969); *National Hells Canyon Ass'n v. FPC*, 237 F.2d 777, 782 (D.C. Cir. 1956), cert. denied, 353 U.S. 924 (1957).

The court of appeals correctly concluded that "the breadth of the public-interest inquiry permitted under section 10(a) should inform the interpretation of section 7(a)'s directions as to who should hold the license" (Pet. App. 35a). The Commission's Section 7(a) inquiry therefore may include the potential economic consequences of its licensing determination. See Pet. App. 33a-35a, 141a-149a, 389a-392a.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The District Of Columbia
Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The D.C. Circuit 4-3 en banc has demolished the purpose of declaratory orders under 5 U.S.C. § 554(e), "to terminate a controversy or remove uncertainty," by its holding that such adjudications are not final as to participating parties—even when a party litigates and loses a statutory construction claim before an administrative agency, he may nevertheless litigate his claim again, or have an agency do it for him *sua sponte*.

The Solicitor General's brief on behalf of the Federal Energy Regulatory Commission confirms the destruction of preclusion principles by the majority en banc. To support such a result it must construct an alternate (although also fatally-flawed) approach—that the *Bountiful* decision "resembled a rulemaking." The fact is however, that the en banc decision, and therefore its role as a precedent, was not based on this newly-asserted approach and indeed recognized that the original decision was a declaratory order issued under 5 U.S.C. 554(e). Therefore, the damage inflicted to basic preclusion principles can only be cured by this Court.

ARGUMENT

1. With respect to preclusion the Solicitor General's brief is (a) mistaken in stating the question, and (b) mistaken in stating the applicable law.

(a) The question presented is whether the Commission may decide a legal claim one way, then later, in a proceeding between the same parties, decide the same claim the opposite way. Since PP&L litigated against Clark-Cowlitz Joint Operating Agency

(CCJOA) and lost its statutory construction claim in *Bountiful*, it should have been precluded from relitigating this claim against CCJOA, or having the benefit of FERC doing so *sua sponte*, in the subsequent *Merwin* proceeding.¹ FERC's stated concern now for maintaining "flexibility in carrying out its statutory mandate" (S.G. Br. 15) is no justification for reversing the *Bountiful* result as to CCJOA and PP&L. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984).

The Solicitor General contends that, for preclusion purposes, whether there is a Section 7(a) statutory preference is a different issue than whether there is *not* a Section 7(a) statutory preference. But the decision by FERC that one interpretation of a statute is required does indeed foreclose the conclusion that an opposite interpretation of the statute is also required, *as between the parties*.

(b) The applicable law on preclusion is entirely clear, and it is contrary to what the Solicitor General's brief

¹ FERC is aware of the correct treatment of the question:

According to the Commission's definition of *res judicata*, adopted in 1979 from the Third Circuit Court of Appeals, a judgment on the merits is conclusive in a subsequent proceeding when that proceeding is on the same cause of action and is between the same parties as in the prior proceeding. Further, *res judicata* applies to both issues that were raised and issues that could have been raised in the prior proceeding.

Greensboro Lumber Co. v. Rayle Electric Membership Corp., 40 F.E.R.C. (CCH) ¶ 61,283 at p. 61,918 n.1 (1987); *see also*, *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910, 913 (10th Cir. 1976); *Nantahala Power and Light Co.*, 29 F.E.R.C. (CCH) ¶ 61,179 at pp. 61,373-74 (1984).

says. When an agency decides a question in an adjudication between two parties, the decision is res judicata. The Court so held with respect to a question of fact in *United States v. Utah Constr. Company*, 384 U.S. 394 (1966).² Res judicata applies equally to questions of law, as the Court made clear in *United States v. Mendoza*, 464 U.S. 154 (1984).

The Supreme Court in recent cases, including the *Mendoza* case, is closely following the Restatement (Second) of Judgments (1982). Especially helpful in the present case (and contrary to the briefs of the Solicitor General and PP&L) is § 83 of the Restatement, which provides (subject to exceptions that do not apply here) that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."³ And the Restatement (Second) of

² FERC previously relied on *Utah Construction* in the *Nantahala* case (supra n.1);

The heart of NP&L's argument is its assertion that a determination made in one proceeding does not prevent a losing party from attempting to persuade the Commission to change its mind on the same issue in a subsequent proceeding. We note, in this regard, that the doctrines of res judicata and collateral estoppel are applicable to administrative proceedings. *United States v. Utah Construction Company*, 384 U.S. 394, 442 (1966); *Second Taxing District of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982).

³ Not only should principles of res judicata require *Bountiful* to be accorded finality, but the statutory scheme governing judicial review and finality of FERC decisions provided under Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), demands it as well. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-41 (1958).

Judgments § 27 (1982) makes clear that *res judicata* applies to issues of fact or law.

2. The Solicitor General's brief discounts the fact that *Bountiful* was a declaratory order proceeding conducted pursuant to 5 U.S.C. 554(e), and argues that since the *Bountiful* adjudication "resembled a rulemaking," the application of preclusion principles "simply is not proper." (S.G. Br. 14). Not even the majority en banc so mischaracterized the *Bountiful* proceedings.⁴

When several new FERC Commissioners were inclined to reverse *Bountiful* at the time the private utilities were seeking certiorari of the Eleventh Circuit's decision upholding preference, the Solicitor General stated to this Court: "Under traditional *res judicata* principles, if this Court denies certiorari and the Court of Appeals judgment affirming the declaratory order becomes final these entities may be bound by the Commission's order in any future relicensing proceeding." J.A. 107 (cited in Petition at 10). This statement recognized the true nature of *Bountiful*. To now call it something else is an inappropriate expedient to avoid the correct result.

If an agency is free as a matter of hindsight to transform an adjudication into a rulemaking as the Solicitor General would have it, then the Congressional purpose in enacting 5 U.S.C. § 554(e) to promote finality through administrative declaratory order proceedings has been rendered a nullity.

⁴ But the majority en banc *did* incorrectly apply "retroactivity" principles. CCJOA's petition challenged that result (Pet. 17-18 n.7)—contrary to the Solicitor's assertion (S.G. 15).

Moreover, even if *Bountiful* were somehow properly viewed as a rulemaking proceeding, FERC would not be free to jettison the *Bountiful* "rule" in the *Merwin* adjudication, for "while an adjudication can overrule an earlier adjudication, the Administrative Procedure Act clearly provides that a rule can only be repealed by rulemaking. 5 U.S.C. §§ 551(5), 553 (1982)." *Am. Fed'n of Gov't. Employees v. Fed. Labor Relations Auth.*, 777 F.2d 751, 760 (D.C. Cir. 1985) (Scalia, J. concurring), citing e.g., *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983).

3. PP&L argues that the "economic impacts" of a license transfer were established as a comparative relicensing criterion by *Bountiful*. However, the issue of whether FERC can utilize the "economic impacts" of a license transfer as its sole basis to circumvent the municipal preference was clearly not decided by the unreviewable dicta in *Bountiful* (Pet. 23; J.A. 289), and no court or judge has ever decided otherwise.

In *Merwin* the FERC ALJ (249a-252a), and also the D.C. Circuit panel, held that while the Commission has broad authority to exercise technical judgment about the soundness and feasibility of competing applicants' plans to develop and utilize in the "public interest" the water resources of the region, that authority does not extend to the use of an "economic impacts" test to second-guess Congressional intent and "render the statutorily-mandated municipal preference a nullity."⁵ 85a.

⁵ The cases cited by the Solicitor General (Br. 20) do not hold that FERC's broad authority extends to the use of "economic impacts" to circumvent the preference. They relate only to the

The majority en banc held, on the basis of its decision that the municipal preference provision is not applicable to the *Merwin* competition, that "FERC may include in its deliberations consideration of the economic consequences of the grant of a license" (33a), but remanded because FERC's result on the economics had been arbitrarily reached.

CCJOA therefore takes exception to the characterization (S.G. Br. 10) that because of the remand, "this case is in an interlocutory posture." There has plainly been a final reviewable decision (for the second time) on the preference question. Quite simply, if preference applies, it cannot be circumvented by FERC's economic analysis and a remand is obviated.

CONCLUSION

Summary action by this Court can undo the lower court's destruction of preclusion principles. The 4-3 en banc reversal of the Circuit's panel on this "bed-rock issue of administrative law" (9a) plainly collides with this Court's holdings in *Utah Construction*, *Mendoza* and *Moitie*, among others, and must be reversed to assure correct application of preclusion principles in administrative practice.

Commission's authority to assess the economic *feasibility* of a project proposal and whether the project is economically preferable to the next-least costly alternative. See also 86a-87a.

Respectfully submitted,

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